REVIEW OF CURRENT LAWS FOR RECOVERING DAMAGES CAUSED BY SPILLS OF OIL AND HAZARDOUS SUBSTANCES

HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT

OF THE

COMMITTEE ON
MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

ENFORCEMENT OF CURRENT LAWS IN OBTAINING COMPENSATION FOR DAMAGES TO NATURAL RESOURCES CAUSED BY POLLUTION, AND CONSIDERATION OF WHETHER NEW LEGISLATION IS NEEDED

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CONTENTS

Page
Hearing held May, 25, 1989 1

Statement of:

Breckenridge, Ms. Lee P., assistant attorney general, State of Massachusetts 15
    Prepared statement 87
Davis, Hon. Robert W., a U.S. Representative from Michigan 2
Dyson, Hon. Roy, a U.S. Representative from Maryland 4
Ehler, Charles N., director, Office of Oceanography and Marine Assessment, NOAA 9
Hoffmann, Ms. Cecil, senior environmental review officer, Department of the Interior 5
    Prepared statement 39
Johnson, Gordon, assistant attorney general, Environmental Protection Bureau, State of New York 7
    Prepared statement 46
Olson, Erik, counsel, National Wildlife Federation 12
    Prepared statement 65
Saxton, Hon. H. James, a U.S. Representative from New Jersey 3
Studds, Hon. Gerry E., a U.S. Representative from Massachusetts, and Chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment 1
Wise, Louise, deputy director, Office of Marine and Estuarine Protection, EPA 16
    Prepared statement 97

Additional material supplied:

National Association of Attorneys General, Spring Meeting 1987, Resolution on National Resource Damage Assessments 59
National Association of Attorneys General, Summer Meeting 1987, Resolution on Availability of Superfund Monies for Enforcement of Natural Resource Damage Provisions 63

Communications submitted:

Shannon, James M., (Attorney General, State of Massachusetts): Letter of 10 May 1989, to Hon. Manuel Lujan 56
Spagnole, James F., (Department of the Interior): Letter of 3 October 1989, response to request for additional information 106

REVIEW OF CURRENT LAWS AND REGULATIONS FOR RECOVERING DAMAGES TO NATURAL RESOURCES CAUSED BY SPILLS OF OIL AND HAZARDOUS SUBSTANCES

THURSDAY, MAY 25, 1989

House of Representatives, Subcommittee on Fisheries
and Wildlife Conservation and the Environment,
Committee on Merchant Marine and Fisheries,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:12 a.m., in Room 1334, Longworth House Office Building, the Hon. Gerry E. Studds (chairman of the subcommittee) presiding.

Members present: Representatives Studds, Hughes, Carper, Hochbrueckner, Pallone, Dyson, Saxton, Coble, and Weldon.

Staff present: Will Stelle, Bill Woodward, Lisa Murray, Joyce Sacco, Lori Williams, Sue Waldron, Tom Melius, Lisa Pittman, and Rod Moore.

OPENING STATEMENT OF HON. GERRY E. STUDDS, A U.S. REPRESENTATIVE FROM MASSACHUSETTS, AND CHAIRMAN, SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT

Mr. Studds. The Subcommittee meets this morning to review current laws and regulations for recovering damages to natural resources caused by spills of oil and hazardous substances.

For the past two months, our Nation has watched in horror and anger as fish and waterfowl, and marine mammals have struggled to survive the worst oil pollution incident in our Nation's history.

The American people, from the President on down, have made it clear that they want that oil spill cleaned up; that they want those natural resources restored; and they want the polluter to pay.

Those are simple principles. In the case of the *Exxon Valdez*, we all support them, but what about other, less-publicized oil spills? What about Superfund sites? Shouldn't the same principles apply?

In my judgment, the answer to that question is yes, but the practice of the Federal Government is no. Our procedures for obtaining compensation for natural resource damages are about as effective as the Alyeska Company's oil spill contingency plan. They are a product of complacency, they bear little relation to the real world, and they do not work.

There are thousands of Superfund sites around this country, but the Federal Government has gone to court to recover for natural resource damages at less than ten.

There have been hundreds of major oil spills since the Clean Water Act became law in 1972, but we have obtained compensation for damages under that statute on only a handful of occasions. Polluters are going scot-free and the reasons are simple.

Federal agencies do not have the money to assess natural resource damages when a pollution incident occurs. If a damage assessment is not done, compensation cannot be obtained. Even when an assessment is done, Federal regulations make full recovery almost impossible, and even if compensation is obtained, there is no assurance that the money will be used to repair or restore the damaged resources, as required by Federal law.

Let me elaborate for a moment on that last point. In 1986, Congress enacted a requirement that money recovered as compensation for damage to natural resources be used solely to restore or to replace those resources. Yet, for the last seven months, OMB has been refusing to permit the creation of an account that would accomplish this purpose for funds recovered as a result of pollution in New Bedford Harbor.

As a result, there is no guarantee that the $2 million currently offered as a partial settlement in that case will be used to restore the damaged resources of the harbor.

Needless to say, this has gotten my attention because that particular harbor is in my district, and because I offered the amendment that OMB is now trying to undermine, and because the New Bedford case will serve as a precedent for hundreds of future cases to come.

Let me be clear: OMB speaks for the President of the United States. The President has sworn to uphold the law. I will do everything I can, beginning with this hearing, to make certain that this law is promptly and fully obeyed.

Today, we will receive testimony from the Federal agencies responsible for obtaining compensation for damages to natural resources caused by pollution, and also from State Governments and an environmental group who have challenged the legality of current procedures.

Based on what we hear today, we will consider the need for new legislation to guarantee that the public interest is protected, not just when pollution incidents make the nightly news, but whenever and wherever our fish and wildlife resources are damaged.

Mr. STUDDS. Without objection, at this point the statement of the gentleman from Michigan, Mr. Davis, will appear in the record.

[The statements of Mr. Davis and Mr. Saxton follow:]

STATEMENT OF HON. ROBERT W. DAVIS, A U.S. REPRESENTATIVE FROM MICHIGAN

Not many people realize that the President has been directed by law to act as trustee for U.S. natural resources harmed or at risk from oil spills, hazardous waste releases, or other pollution incidents. The President has delegated the trustee role to several Federal agencies, including the Departments of Commerce and Interior. As trustees, these agencies are to examine Superfund sites, oil spills, and other polluted areas to see if any of the resources in their charge have been harmed or are threatened with harm. This authority extends not only to land areas, but also inland waters, the ocean, and the Great Lakes. For example, several of the sites listed on EPA's Superfund National Priority List are located along the shores of Lake Michigan, and hazardous substances from these sites have very likely affected Great Lakes fish and other creatures. It is also probable that the 42 Great Lakes "Areas of Concern" identified by the International Joint Commission under the Great Lakes Water Quality Agreement have disturbed natural resources important to U.S. recreational and commercial interests.

Mr. Shumway, Mr. Young, and I have introduced H.R. 2255 in an effort to assist one trustee in its efforts to fully carry out its obligations to the public. The National Oceanic and Atmospheric Administration is the only agency to have successfully brought a natural resource damage claim action in Federal court, and is apparently one of the few agencies which has actually assessed damage to resources under its stewardship. NOAA has preliminarily identified 143 coastal sites at which resources under its aegis may be threatened or harmed, and many of these resources have significant value.

Unfortunately, NOAA's resource duties have found little favor with OMB, and no money has been requested for natural resource damage assessments in any budget yet submitted by the Secretary of Commerce. Because both the Superfund and the Clean Water Act section 311(k) fund have been closed from providing up-front money for damage assessments, as well as money to restore the harmed resources, it is even more imperative that NOAA have monies at hand.

Our bill creates a revolving fund for the deposit of monies recovered by NOAA for damage assessment costs from polluters. NOAA has such a case pending in Federal court in Massachusetts under the Superfund law, but has run into roadblocks in establishing a separate account to hold its recoveries as contemplated by Superfund. Unless such an account is available, the recovered monies could well be deposited in the General Treasury, where an appropriation would be needed to release the funds; we have seen how unsuccessful the agency has been at this. Even worse, if the monies recovered are deposited back into the Superfund, they will not be available to reimburse the agency for its assessment costs or be available to restore the harmed fisheries. This is in direct contravention of the statute.

In addition, our bill funds the revolving account with $750,000 in seed money to conduct natural resource damage assessments until monies are recovered and placed into the account. NOAA has a case in southern California which will be jeopardized by a statute of limitations unless it completes its assessment by early next year. These funds will allow NOAA to calculate the harm to marine resources at that site, without forcing the agency, as it has in the past, to take scarce dollars away from other resource protection programs.

Of course, I wish that this bill was not necessary, and that NOAA and the other trustees had the funds to protect U.S. resources at risk from pollution incidents. However, this does not appear to be the case, and I ask that our colleagues support our measure as one element in the fight to clean up our besieged environment.

Thank you, Mr. Chairman.

STATEMENT OF HON. H. JAMES SAXTON, A U.S. REPRESENTATIVE FROM NEW JERSEY

Thank you, Mr. Chairman, for holding this oversight hearing on natural resource damage assessments conducted under the Clean Water Act and Superfund.

I won't pretend that this isn't one of the more confusing issues to be addressed by this Committee. There are a lot of details to be considered today. One, the current situation which mandates that resource restoration be taken into account during a site evaluation, while at the same time, locking up the funds necessary to perform the required assessment. And two, the use of below market prices to determine the cost of restoration and or replacement rather than taking into account state concerns; such as "user loss" and consequences from damage that may affect the future productivity of a resource.

The Committee's immediate crisis is over the tragedy in Alaska and the measures we must take to ensure prevention of another disaster with its magnitude. We must also make sure that provisions for dealing with such an event run smoothly and effectively. It is for this reason we are here today. As such, I stand in support of Congressman Shumway's bill to establish a revolving loan fund for NOAA to perform damage assessments. This is vital, as we cannot be assured that every polluter will step forward with up-front monies as Exxon has.

As a Member of the New Jersey delegation, I am familiar with the lethargic pace of Superfund cleanups. As such, I am anxious to work with this Subcommittee to support measures which will enable these laws and the agencies to which their powers are entrusted, to be more responsive and effective.

Thank you, Mr. Chairman. I look forward to hearing from our panel.

Mr. STUDDS. The gentleman from Maryland.

OPENING STATEMENT OF HON. ROY DYSON, A U.S. REPRESENTATIVE FROM MARYLAND

Mr. DYSON. Thank you, Mr. Chairman. Mr. Chairman, I first would like to welcome our panel. I think we have all followed the *Exxon Valdez* catastrophe, which is a shocking reminder of the risks we take when we decide to develop energy resources in sensitive coastal environments.

The question is whether or not we are willing to deal with the consequences of our actions when the risks become reality.

Maryland and Virginia State Governments have banned drilling for oil and gas in the Chesapeake Bay, which is in the slow process of recovering from years of environmental neglect and abuse; but as some of you might know, exploratory drilling is now taking place on the banks of the Potomac River in Virginia.

Despite the fact that no wells can be drilled into the bay floor itself, the drilling now underway along the Potomac could conceivably prove commercially viable.

Production would then pose a significant threat to the bay's recovery.

Mr. Chairman, I would like to know precisely how much responsibility private parties have for the damages they inflict on natural resources. Further, I am vitally interested in knowing if Federal authorities can enforce a full restoration of any damaged resource. In this regard, it worries me that the cost of conducting damage assessments or restoring natural resources to their original state are not covered by Superfund.

It worries me that the Clean Water Act does not provide trustees with a way to conduct damage assessments or restoration activities. Nor does it make sense to me that those trustees who succeed in recovering funds from responsible parties are not able to establish accounts in which to deposit those funds and use them to restore damaged resources.

I have little confidence in a standard of assessment that provides for recovering damages that are the "lesser of lost use value or cost of restoration."

How does the Interior Department justify this standard when the Superfund law provides that the measure of damages is not limited to the cost of restoration?

Mr. Chairman, these are all issues of great relevance to the residents of Maryland and the Chesapeake Bay. We must be capable of responding adequately, by providing the necessary legislative framework which will allow trustees to recover from responsible parties the cost of cleanup, damage assessment, restoration, acquisition and replacement.

I look forward to the testimony of this panel, and I thank you, Mr. Chairman, for holding this hearing today.

Mr. STUDDS. The gentleman from New Jersey.

Mr. SAXTON. Mr. Chairman, if I may just ask unanimous consent to have my opening statement placed in the record.

Mr. STUDDS. This gentleman from New Jersey.

Mr. HUGHES. Thank you, Mr. Chairman. I have no opening statement. I just want to thank you for convening the hearing. It is an important issue. Unfortunately, the law has not been very certain, or direct, in attempting to provide damages for the cleanup and restoration of natural areas damaged by oil spills, toxic waste spills of all kinds, and I look forward to hearing the testimony today. Thank you.

Mr. STUDDS. The remainder of the State of New Jersey.

Mr. PALLONE. [No response.]

Mr. STUDDS. Very well. We will begin. As I understand it, the witnesses have agreed to appear, as you see them, in a panel, and to do the usual humane confining of their oral presentation to five minutes, knowing, confidently, that their full written testimony will appear in the record. We will proceed in the order in which their names appear on the witness list, and we will allow all six of you to make your opening statements, and then we will proceed with questions from the Subcommittee.

We will begin with Ms. Cecil Hoffmann, Senior Environmental Review Officer, Office of Environmental Project Review, Department of the Interior. Ms. Hoffmann, welcome.

STATEMENTS OF A PANEL, CONSISTING OF CECIL HOFFMANN, SENIOR ENVIRONMENTAL REVIEW OFFICER, OFFICE OF ENVIRONMENTAL PROJECT REVIEW, OFFICE OF ASSISTANT SECRETARY FOR POLICY, BUDGET, AND ADMINISTRATION, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY WILLIE TAYLOR, ECONOMIST, OFFICE OF PROGRAM ANALYSIS; GORDON JOHNSON, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF LAW, ENVIRONMENTAL PROTECTION BUREAU, STATE OF NEW YORK; CHARLES N. EHLER, DIRECTOR, OFFICE OF OCEANOGRAPHY AND MARINE ASSESSMENT, NATIONAL OCEAN SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; ERIK OLSON, COUNSEL, ENVIRONMENTAL QUALITY DIVISION, NATIONAL WILDLIFE FEDERATION; LEE P. BRECKENRIDGE, ASSISTANT ATTORNEY GENERAL, CHIEF, ENVIRONMENTAL PROTECTION DIVISION, COMMONWEALTH OF MASSACHUSETTS; LOUISE WISE, DEPUTY DIRECTOR, OFFICE OF MARINE AND ESTUARINE PROTECTION, U.S. ENVIRONMENTAL PROTECTION AGENCY, ACCOMPANIED BY TIM FIELDS, DIRECTOR, EMERGENCY RESPONSE DIVISION

Ms. HOFFMANN. Mr. Chairman——

Mr. STUDDS. Can you bring that mike closer to yourself. That will help a lot. Thank you.

Ms. HOFFMANN. All right. I have already been introduced, so I will proceed to say that I have brought with me several members of the team who wrote the natural resource damage assessment regulation, two of them who work in my direct office—David Rosenberger and Linda Burlington. Willie Taylor, an economist from the Office of Program Analysis was also on that team, as was Pete Escherich from the Fish and Wildlife Service. They are all here to help answer your questions today.

We are pleased to have the opportunity here today to focus on the natural resource damage assessment rule authorized by the Superfund law and developed by the Department of the Interior for the use of natural resource trustees, which are generally Interior, and other Federal agencies, particularly NOAA, the States, and, in certain circumstances, Indian tribes.

We found that criticism of the rule stems often from a lack of knowledge about what is in the rule itself, so I am going to quickly list the major points in our statement, first, on the basic elements of the rule, and then on our preliminary natural resource survey procedures which we understand are the focus of attention here today.

There are two kinds of regulations, called type A and type B because of the way they are stated in the Act. Section 301(c) is quoted in our statement. Type A procedure is intended to be easy to use to assess natural resource damages based on the amount of substance released, and the kind of environment it was released into.

The Department has developed one type A procedure which is used as a computer model for spills or releases into coastal and marine environments. All assessments require a plan, and certain pre-assessment activities. Then both type A and type B assessments require the same three steps: injury determination; a quantification of the effects of the injury; and a damage determination, "damages" being the term we use for monetary compensation for the injury to the resource.

In the injury determination phase of a type B, trustee officials determine measurable adverse changes in their resource. Injury to surface water resources, for example, may be indicated when water quality does not meet existing EPA or State-promulgated standards.

Injury to biological resources may be indicated not only by dead birds, or fish, or whatever; but by such things as disease, behavioral abnormalities, or physical deformations. In other words, an adverse change in viability.

In the quantification phase, trustee officials identify the services provided by the resource, such as habitat or recreation, determine the baseline, and quantify the reduction that has occurred because of the spill.

Then in the damage determination phase, the focus is on economic valuation of natural resource injuries. Trustee officials calculate the monetary compensation for the resource injuries they have determined and quantified in the preceding phases. They may do this based on the estimated costs to replace or restore the resource, or, based on the loss-in-use value of the resource.

After these steps, there is a requirement for a report of an assessment, establishment of an account for damage assessment awards, and development of a restoration plan. By law, all damage assessment awards are to be used for the restoration or replacement of injured resources.

The bottom line of our procedures is restoration of the injured resources. By law, the claim filed by a natural resource trustee, using these rules, gains the evidentiary status of a rebuttable presumption. Therefore, the quality of information developed by the trustee, and the completeness of the documents he writes are important.

The assessment has to be sound so as to warrant the rebuttable presumption. It is important to note that the use of this regulation is optional. and that the law calls for a review of the rule every 2 years.

Trustee activities are not included under the national contingency plan, which is addressed to response efforts, or cleanup. Damage assessments cover injury remaining after cleanup. The rule provides for multiple trustees to coordinate with each other.

Finally, a few points on our preliminary natural resource surveys, our program for addressing hazardous waste sites under the Superfund natural resource trustee provisions. This effort continues at a rate of about 230 to 250 PNRS a year. We have interagency agreements within EPA regions which are intended to allow us to have completed our study, our survey, and have the basis for a departmental position on natural resources concerns at a site by the time EPA is ready to negotiate or take other action at the site.

We feel it is important that our efforts in court be joined with those of EPA in the situations where the same PRP is responsible. When we receive requests for Interior agreement to a covenant not to sue a responsible party, we schedule activities necessary to update our PNRS information, if we have looked at the site before, or to conduct a PNRS, if we have not.

Based on these findings, a letter is sent from Interior's Solicitor to the Department of Justice. EPA has just developed a guidance manual on environmental evaluations at sites. We participated in the development of that manual and we think it is a good job. We think it will help trustee agencies participate at early stages in EPA site evaluations and cleanup determinations on a more regular basis, as needed.

We are pleased with the number of sites at which our trustee concerns can be resolved by working with EPA and the responsible parties, site by site. We continue to see these kinds of settlement opportunities offered by section 122(j) which was added in SARA, and with which we are very pleased, as one of the strong points of the Superfund program.

We appreciate the interest of the Committee in our natural resource trustee activities, and we will try and answer your questions as quickly as we can here, and at length, for the record.

[The statement of Ms. Hoffmann can be found at end of hearing.]

Mr. STUDDS. Thank you, Ms. Hoffmann. Next, Mr. Gordon Johnson, Assistant Attorney General for the State of New York. Mr. Johnson.

STATEMENT OF MR. JOHNSON

Mr. JOHNSON. Thank you for the opportunity to appear before the Subcommittee. Attorney General Robert Abrams of New York asked me to express his apologies for not being able to attend in person.

We, in New York, are pleased to be able to testify, for New York is committed to the protection of its natural resources, and the implementation of the natural resource damage provisions of CERCLA, which this Committee has done so much to advance.

Unfortunately, New York is very familiar with the injuries and harm caused by deadly chemical spills. PCBs have fouled our Hudson River, contaminating striped bass, and other fish hundreds of miles away from the point of release.

Toxic air releases have threatened the health of New Yorkers, and contaminated their land with lead and heavy metals. Hazardous chemicals have ruined groundwater from Long Island to Niagara Falls.

So we all know, too well, what happens when natural resources are not protected. We also know that when they are damaged, they must be restored, whenever possible.

With the passage of the Superfund Amendments and Reauthorization Act in October of 1986, Congress reaffirmed the importance of the natural resource damage provisions of CERCLA. Those provisions recognize that when there are chemical or oil releases that cause injury to our natural resources, justice demands that those responsible for the release pay damages sufficient to restore or replace the damaged resources, as well as compensate for the lost uses of the natural resources until they are restored or replaced.

As you know, SARA contained two very important provisions relating to natural resource damages. First, it directed the Department of the Interior to amend the natural resource damage assessment regulations, to implement SARA and Congress's mandate in CERCLA and the Clean Water Act, to protect and restore those resources.

Second, in order to affirmatively involve the Federal natural resource trustees in the Superfund process, Congress added section 122(j) to CERCLA. That provision requires EPA to notify trustees of natural resources of negotiations and CERCLA actions.

It also requires the trustee—not EPA or the Justice Department—to approve any waiver of natural resource damage claims in the settlement of a CERCLA action, and only if the settlement will result in the protection and restoration of the resources.

Unfortunately, these amendments have not had their intended effect. First, in practice, the regulations, which were not significantly amended, remain a hindrance to the collection of damages rather than an aid.

No State has used the regulations in the almost 3 years since their promulgation. The major reason why is that the Interior Department rejected CERCLA's requirement that, when computing damages, restoration of the damaged resource guide the assessment process.

Restoration should be the minimum measure of damages. Damages should also include the value of lost uses pending restoration, and when the resource cannot be restored damages should be sufficient to acquire the equivalent natural resource, and restore all our lost uses. Society must be made whole.

Furthermore, the regulations pointedly ignored the fact that our natural resources are held in trust for future generations, and their value is not simply measured by the marketplace. In these regulations, trees are just lumber whose value is measured in cents per board-foot. In reality, trees are part of a forest, the forest the Interior Department has missed, that has numerous uses worth far more than two-by-fours.

Similarly, the regulations treat endangered species as only obstacles to development, and seals as only fur coats, not as creatures whose uniqueness and existence are highly valued.

There are other problems with the regulation which our longer statement goes into, and which the other participants on the panel will address.

Second, the Department of Interior's regulations hinder the creation of a harmonious working relationship between Federal and State trustees, exactly the opposite of Congress's intent.

State trustees, while often anxious to assess and collect damages, have found that Federal regulations make their job very difficult to impossible, especially when the Federal trustees are insisting that these unsatisfactory regulations must be followed.

The problem is not that the regulations are too complicated, but, rather, that they are wrong conceptually. The only winners in the disputes between the State and Federal trustees on how to assess damages have been the polluters.

And third, State trustees, and even the Federal trustees need access to the Superfund to pay for natural resource damage assessments and enforcement. While CERCLA authorizes payment from the fund for these purposes, the current taxing provisions prohibit expenditures from the fund for these purposes. We ask that Congress restore Superfund as a source for seed money—which is what an assessment is—for seed money for the collection of damages, and allow assessments and enforcement to be funded by the Superfund. We also ask that Congress's intent, that restoration be the minimum measure of damages, be reaffirmed. Thank you.

[The statement of Mr. Johnson can be found at end of hearing.]

Mr. STUDDS. Thank you, sir. Next, Mr. Charles Ehler from the National Ocean Service in NOAA. Mr. Ehler.

STATEMENT OF MR. EHLER

Mr. EHLER. Thank you, Mr. Chairman. I am Charles N. Ehler, the Director of NOAA's office of Oceanography and Marine Assessment within the U.S. Department of Commerce.

One of my current responsibilities is the coordination of NOAA-wide activities related to assessing the damages resulting from the *Exxon Valdez* oil spill.

NOAA has worked on assessing the costs of oil and chemical spills since the *Amoco Cadiz* incident off the coast of Brittany in 1978. One element of my office, the Hazardous Materials Response Branch, provides scientific support to the Federal on-scene coordinator during spills of oil and hazardous materials into coastal and marine waters. That group has been actively involved in the cleanup operations and scientific activities in Prince William Sound since the early hours of the spill.

I appreciate the opportunity to discuss how the National Oceanic and Atmospheric Administration is carrying out its responsibilities on behalf of the Secretary of Commerce as a Federal trustee for natural resources in coastal and marine areas.

I will be updating material furnished you in response to your August 20th, 1987 request for information on our trustee activities. NOAA's trusteeship responsibilities are derived from a number of statutes providing for the management and protection of living and non-living marine resources.

The scope of our trusteeship reflects our mandate to protect not only species, but also the ecosystems that support these species. In coastal waters, tidal wetlands, and anadromous and catadromous fish streams, our trusteeship overlaps that of the Department of the Interior, possibly other Federal land-managing agencies, such as the Department of Agriculture, and Indian tribes, as well as the States with jurisdiction over those areas.

In exercising its trusteeship in coastal areas, NOAA therefore is careful to coordinate closely with all other co-trustees.

With financial support from Superfund, we have developed a comprehensive program to address potential threats to our trust resources from coastal hazardous waste sites through EPA's remediation of those sites, and through negotiations with potentially responsible parties.

This work also benefits EPA by helping it resolve environmental concerns in a timely manner during the remedial process, and in cost recovery negotiations with responsible parties. Our Hazardous Materials Response Branch has individual professionals called coastal resource coordinators, actually assigned to EPA regional offices in all the coastal standard Federal regions, except region six.

The CRCs review existing information on coastal hazardous waste sites when the sites are added to the National Priorities List, and make a preliminary assessment of their potential to affect NOAA trust resources.

Since 1984, we have reviewed data on 584 hazardous waste sites in coastal areas, and have identified 213 of those sites as having the potential to affect our trust resources.

Descriptive material on these identified sites is available for each year since 1984. I have a copy of our 1989 report—it looks like this—which I will leave with the Committee.

More comprehensive NOAA reviews on coastal waste sites, called preliminary natural resource surveys, are conducted for and funded by EPA under Superfund in accordance with a 1989 memorandum of understanding between NOAA and EPA.

These surveys build on the information in the NOAA reviews. They are generally based on more complete data on the site, and possible off-site contamination. They contain findings of fact on the physical nature of the site, the known contaminants and extent of contamination, and the NOAA trust resources and habitats at risk. In addition, the surveys contain a separate litigation-sensitive section that provides EPA with a preliminary indication of whether or not NOAA may be able to release the responsible party from natural resource damages, and identifies any additional data, or special monitoring or cleanup conditions that we may require from the parties in order to grant a release.

This information assists the Department of Justice and EPA in negotiating comprehensive settlements with responsible parties. We have completed about 30 preliminary natural resource surveys for EPA since initiating this activity in 1988.

The Superfund Amendments and Reauthorization Act of 1986 prohibit the use of Superfund monies for natural resource damage assessments. We cannot therefore use our coastal resource coordinator program to conduct the assessments needed to initiate claims at those sites where we believe serious past damages have occurred.

One of those sites was New Bedford Harbor in Massachusetts, where PCBs released by electrical manufacturers over several decades contaminated the harbor and led to the closure in 1979 of the bottom fish and lobster fisheries.

The Department of Justice filed a claim on behalf of NOAA in December 1983. No trial date has yet been set by the court. Using its program resources, our base resources, NOAA completed a joint damage assessment with the Commonwealth of Massachusetts in December 1986 that showed an array of past and future damages to the harbor's living and non-living natural resources, ranging from $40 million to more than $55 million. Four categories of damages were assessed: the commercial lobster fishery; recreational fishing; beach use; and the amenities provided by the harbor itself.

The United States agreed to a $2 million proposed settlement with one of the five defendants. In January of this year, the Department of Justice, on behalf of NOAA, the Department of Interior, and the Coast Guard, filed a claim in the United States District Court against Apex Oil Company, and several other companies, for damages that occurred as a result of a tank barge oil spill off the coast of central California during January and February of 1986.

In what may be our most important waste-site case to date, we are now initiating investigations of injuries to our trust resources in the coastal waters near Los Angeles, California. For approximately 30 years, local industries released into the ocean large quantities of hazardous chemicals that are now present in the marine sediments, crustaceans, fish, and mammals.

Because these chemicals decompose slowly, they persist in the environment and are available for biological uptake. NOAA is investigating the effects of these chemicals on its trust resources and any resulting impairment of their use by the public.

When a major spill occurs, one that would trigger a full-field damage assessment, NOAA and other trustees must assemble an ad-hoc team of marine scientists, resource economists, and lawyers from our base programs, who can respond immediately.

Such a team was assembled quickly, and damage assessment investigations were initiated shortly after the *Exxon Valdez* grounded on Bligh Reef on March 24, and poured more than 10 million gallons of North Slope crude into Alaska's Prince William Sound and adjacent coastal waters.

A NOAA marine mammal expert was on the scene the same day, checking the presence of marine mammals in areas at risk from the oil. More extensive sampling of the presence of living marine resources and pre-spill water quality began the following day, that is, March 25th.

In Washington, NOAA, working with other affected natural resource trustees—the U.S. Departments of Agriculture and the Interior, and the State of Alaska—and the Department of Justice, initiated action to obtain Exxon's agreement to provide an initial $15 million toward the cost of the damage assessment resulting from this spill. NOAA joined the other trustees in establishing a management structure for that assessment. The resulting trustee council is based in the State of Alaska. Each trustee has a designated representative to this council.

Our representative is the Director of the National Marine Fisheries Service's Alaska regional office. WE have assigned a full-time manager and staff from the National Ocean Service, the organization within NOAA that has the most experience in the damage assessment field, to manage the overall NOAA assessment.

We have also set up an *Exxon Valdez* damage assessment center in Washington to coordinate that effort. We are working up in Juneau, Alaska with representatives of the other trustee agencies, and with the Department of Justice to develop the damage assessment plan.

In addition to this, NOAA is participating in the development of an interagency strategy for conducting long-term research on the effects of this spill. I mention these details to make it clear that NOAA is determined to implement its trustee responsibilities in this case as fully and effectively as it can.

That concludes my testimony, Mr. Chairman. I would be happy to answer any questions you or other Members of the Subcommittee might have.

Mr. STUDDS. Thank you, sir. Next is Mr. Erik Olson speaking I think for the National Wildlife Federation. Mr. Olson.

STATEMENT OF MR. OLSON

Mr. OLSON. Thank you, Mr. Chairman. As you mentioned, I am Erik Olson with National Wildlife Federation's Environmental Quality Division. We are the Nation's largest environmental organization with 5.8 million members and supporters. I am also appearing on behalf of several other environmental groups which are listed in my written statement.

We appreciate this opportunity to testify today on the important natural resource damage program. The environmental community advocated the adoption of the natural resource damage program and has closely monitored how it has been implemented.

On several occasions, National Wildlife Federation, and other groups, have had to go into the courts to force an often reluctant Federal Government to fulfill its statutory duties under the program. As we discuss the complex issues that are raised by the natural resource damage program, it is easy to lose sight of the basic concept's profundity.

Congress has stated, in very clear terms, that the Government officials are to serve as legal guardians for fish, wildlife, and pristine ecosystems, recognizing that often they cannot speak for themselves when they are destroyed by man's oil spills and toxic wastes.

As we view the very gripping photographs of some of the more than 700 oil-soaked dead sea otters, tens of thousands of lifeless sea birds, and dozens of bald eagles killed by the *Exxon Valdez* spill in Alaska, the importance of these provisions is lost on few Americans.

We are here today to discuss how these far-sighted natural resource damage provisions actually work in practice. Unfortunately, we must report that with precious few exceptions, they have been doing little more than gathering dust in the law libraries.

Few natural resource damage assessments have been done, and even fewer damage claims have been collected. The basic reasons are four, and I will summarize them. First, the lack of assessment money. As has been referenced, in 1986, Congress cut off the availability of Superfund money and the Clean Water Act 311(k) fund for oil spills has been interpreted not to authorize up-front money for assessments. Thus, the trustees cannot assess the degree of damage to natural resources, and therefore they have inadequate information to file claims, and even to negotiate strong claims against polluters.

The result is that the trustees often decide not to prosecute claims, or they sign a covenant not to sue the polluter, based on paltry or virtually non-existent knowledge.

At many sites with obvious damage to natural resources, the Interior Department, and others, have filed no claims due to a lack of resources to conduct an assessment.

This can also lead to a subtle blackmail problem which we have observed at many sites. The responsible party, fully aware that the trustee lacks adequate resources to an assessment, can "strong arm" the trustees into an agreement to do a very limited damage assessment, or can negotiate minimal damages because of the trustee's weak factual record and poor negotiating position.

In the case of the recent Alaska spill, the trustees have had to rely on Exxon to pay for $15 million for the assessment. Since Exxon is paying, it likely will argue that it has a lot to say about how that damage assessment is going to proceed, and I understand that most of that $15 million, if not all of it, has already been committed, so that, frankly, there will not be adequate money there unless there are further appropriations or further agreements to do the assessment in Alaska.

The second reason for the lack of progress is the Interior Department's regulations. As you have heard already this morning, at all Superfund sites, as well as at oil spills such as the *Exxon Valdez* tragedy, application of Interior's rules would seriously under-value the injured and destroyed resources. These rules are not all that complicated, at least the fundamental concepts are not. Superfund itself specifically says that the measure of damages shall not be limited by the sums which can be used to restore or replace the injured resources.

Similarly, the Clean Water Act says that the trustees, "shall recover for the costs of replacing or restoring such resources." Yet, under Interior's "lesser of" rule, the trustees may recover only the lesser of those very restoration costs versus the so-called lost-use values, which are generally based on market value, and far less than the cost of restoring, or replacing them. The $15 fur seal example is one that is often cited. There is no way you can restore a fur seal for $15, based on its pelt's market value.

This is directly contrary to President Bush's stated position that they are going to seek "complete restoration of the ecology and economy of Prince William Sound," and also contravenes Interior Secretary Lujan's public statement that they will try to get Exxon to, "try to put the environment back as it was."

These, and other problems, have essentially rendered the rules useless to the trustees.

The third important reason why this program is not working has been Interior Department's apathy. The management of the Department of the Interior, and that of some of the other Federal trustees, has demonstrated remarkable apathy towards the program, giving it little or no budget or management priority. At many sites, known damages exist, but no assessment has been conducted, and often covenants not to sue have been signed, based on no knowledge.

Similarly, in large part due to the vacuum of Federal interest and leadership, only a handful of States have vigorously pursued their own natural resource damage claims.

The fourth and final reason is because of EPA's and Department of Justice's uncaring attitude. Both EPA and DOJ seem to view these provisions as basically an afterthought, as troublesome stumbling blocks that can complicate their cleanup negotiations, or as a bargaining chip, rather than as an opportunity to ensure that there is full restoration.

The shocking lack of progress in this program is especially troubling because of the statute of limitations which is approaching rapidly. Congress extended that in 1986, and, again, we are falling down and we are not going to be filing claims at hundreds or perhaps thousands of sites where claims should be filed.

For example, NOAA's top-priority pollution site off the coast of Los Angeles, which has been mentioned this morning—the assessment will cost just $1 million or $2 million. It is possible that the claim will be up to $80 million, yet NOAA lacks the assessment money to develop the claim, and may lose the claim due to statute of limitations.

If the present course continues, hundreds of claims against polluters across the country will be lost, and the taxpayer likely will be asked to foot the bill for restoration of natural resources. This is precisely the opposite of the result that was intended by Congress's adopting the "polluter pays" principle.

In order to get this program back on its feet, we recommend that Congress take three actions. First, re-open Superfund to allow it to be tapped by the trustees for assessment costs. It should also be available for payment of damages at orphan sites. But the payment of assessment costs is clearly of the highest priority, so that polluters will not be able to inappropriately settle cases with a "strong armed" trustee, or so that we do not completely lose claims, due to lack of information, when the statute of limitations expires.

Secondly, Congress should adopt comprehensive oil-spill legislation that, among other things: first, provides trustees with "up front" money for damage assessments; second, defines natural resource damages broadly, to make it very clear that restoration costs plus lost-use values are compensated; and third, assures that natural resource damage assessments are done swiftly. There is a bill introduced by Representative Peter Smith of Vermont, H.R. 2223, that would seek to do that.

And thirdly, we request an in-depth General Accounting Office review be requested by this Subcommittee of the Interior Department and the overall Federal implementation of the natural resource damage program.

We think there are a lot of interesting things that would be uncovered by such a General Accounting Office review.

To date, the natural resource damage program has been a "headless horseman" without a horse. Interior has had to be dragged into court to get it to comply with the law, and Federal agencies have lacked the will or the resources to make the program work.

Congress should take the steps urged above to rejuvenate this languishing but potentially very powerful weapon to protect and restore the natural environment.

Thank you very much.

[The statement of Mr. Olson can be found at end of hearing.]

Mr. STUDDS. Thank you, sir. Next, Ms. Lee Breckenridge, Assistant Attorney General of the State of Massachusetts. Ms. Breckenridge.

STATEMENT OF MS. BRECKENRIDGE

Ms. BRECKENRIDGE. Mr. Chairman, and Members of the Subcommittee, thank you very much for the opportunity to testify today on behalf of Attorney General James Shannon. We appreciate very much the invitation to appear, and we appreciate your continuing interest in these important natural resource damages issues.

Congress has clearly recognized the uniqueness and the value of natural resources by establishing liability for natural resources damages in CERCLA, and by providing that the funds recovered will be used to restore and replace the resources damages, not simply paid into the General Fund.

Despite the importance of these legislative goals, and the potential importance of these claims in litigation, going beyond mere cleanup costs, the claim has been little used in Massachusetts, as elsewhere.

We see several major reasons for this. A primary cause is the inadequacy of the Department of Interior regulations. Trustees need the rebuttable presumption that the regulations would afford in order to go forward, readily, to present evidence, and to recover for natural resources damages.

The Department of Interior regulations therefore have definitely stood in the way of formulating successful claims, by restricting recovery under the regulations to only a fraction of the obvious value of such resources to the public at large.

I would note, that not only do those regulations call for the lesser of the lost-use value, and the restoration cost to be recovered, as you have already heard, but there are a number of other grave problems with the regulations.

For example, one serious problem with the regulations is that they do not provide any compensation for injuries to resources that have not been committed to a specific public use, such as a public park.

The vast array of natural resources, which are not specifically committed formally to a public use already, or which are subject to the ownership rights of private parties, are thus intentionally omitted from the regulations.

This approach ignores important public rights in natural resources. For example, Massachusetts law recognizes groundwater as a natural resource that belongs to the Commonwealth and is subject to ongoing control and regulation for the benefit of the public.

Co-existing private rights to make use of that resource do not remove its inherent value as a public resource. In essence, the regulations wrongly treat overlapping public and private rights as though they fell exclusively in private hands.

The rules create another problem, by requiring a trustee to prove beyond a scientific doubt that a particular natural resource injury resulted from a particular discharge of hazardous substances.

This excessively restrictive standard of proof conflicts with the objectives of CERCLA, and it imposes additional financial and technical requirements on trustees that may be impossible to meet.

While these are not the only flaws in the regulations, they are the most troublesome obstacles to recovery of damages. That the regulations are optional does not render the regulations harmless.

Natural resource damage assessment is an art that is in its early stages of development. Any methodology that the Federal Government maintains as the correct approach, to the exclusion of others, is bound to have an influence far beyond its immediate application, as the trustees and the courts work to develop precedents for future assessments.

The regulations serve as a poor model, we believe. Furthermore, they deny the trustees the benefit of any rebuttable presumption for other approaches to damage assessment.

This critical difference in the burden of proof can gravely undermine the ability of the trustees to use other methods to evaluate natural resources damages. There are numerous other problems, including the grave problem of funding. Funding affects not only the long-range ability of trustees to evaluate natural resources damages, but it also has an effect on the timing and coordination of assessments with response activity.

This is something that has been addressed in greater length in our statement, and also by other speakers. Thank you very much.

[The statement of Ms. Breckenridge can be found at end of hearing.]

Mr. STUDDS. Thank you very much, Ms. Breckenridge. And finally, Ms. Louise Wise of the EPA. Ms. Wise.

STATEMENT OF MS. WISE

Ms. WISE. Thank you, Mr. Chairman. I am, as you say, Louise Wise, Deputy Director of the Office of Marine and Estuarine Protection in EPA's Office of Water.

I appreciate this opportunity to discuss EPA's authority under the National Contingency Plan, and EPA's unique role in the *Exxon Valdez* incident.

Generally, as you know, the National Contingency Plan provides the blueprint for EPA's and other Federal agencies' activities in responding to oil spills, or releases of hazardous substances.

Depending on the location of the oil spill, or the hazardous substance release, either EPA or the Coast Guard will designate an on-scene coordinator to direct response activities at the site.

The National Contingency Plan also addresses certain activities of the natural resource trustees. The plan provides, for example, for notifying the trustees when releases occur, coordinating with trustees in conducting investigations and planning response actions, and notifying trustees of any settlement negotiations with responsible parties.

Generally, because of the limitations on the use of CERCLA funds for natural resource damage assessments and restorations, EPA has increased its efforts aimed at supporting trustee claims against responsible parties. Under its Superfund or CERCLA authorities for hazardous substance releases, EPA both provides and receives support from the various trustees.

In this regard, EPA, at the trustee's request, provides the scope of proposed studies designed to assess the nature and extent of contamination at a site.

It also evaluates remedial alternatives that must address the contamination, that may give rise to the natural resource injury. It coordinates with the trustee to ensure that residual injury not addressed by EPA's remedial action will be addressed by the trustee.

It provides technical assistance to the trustees, and it funds preliminary resource surveys conducted by the trustees. EPA has also published risk assessment guidance which encourages close cooperation among the concerned agencies.

Most of the Federal regional offices have what we call biological-technical assistance groups that serve as the focal point for this coordination. These groups use the expertise of EPA and trustee field specialists to identify resource concerns and make remedial investigations, and feasibility study recommendations.

This coordinated process sometimes obviates the need for damage assessments by assuring that natural resource concerns are addressed by responsible parties in the remedial process. When trustee concerns are met, responsible parties may be released from further action by the trustees, by covenants not to sue. The goal of this activity is to address natural resources within EPA's current resources and its statutory limitations, in a way that supports and complements the activities of the designated trustees.

With respect to the *Exxon Valdez* oil spill, the President has directed EPA Administrator William Reilly to coordinate and assure a long-term recovery of the environment in Prince William Sound.

To carry out this directive, the Administrator will be proposing a coordinating mechanism that would include the trustees and the State of Alaska. This coordinating group would provide focus for the various activities related to the incident. It is expected that this mechanism would simply build upon existing mechanisms now in place, such as the trustee council, and the National Ocean Pollution Policy Board.

In conclusion, Mr. Chairman, much work lies ahead for us, and the President has directed that we coordinate our efforts to restore the area. This work will require the close cooperation of all agencies. I believe this can be done if we keep our eyes focused on our common goal, to obtain the full recovery of natural resources in Prince William Sound. I would be glad to answer any questions you may have.

[The statement of Ms. Wise can be found at end of hearing.]

Mr. STUDDS. Thank you very much. Let me begin, if I may, with a series of questions on the New Bedford case, not solely for parochial reasons but because of its precedential importance.

Mr. Ehler, I want to ask you about how the Government intends to make sure that the $2 million that may be coming in from the partial settlement of the New Bedford case is going to be put to work in New Bedford.

It is my understanding, humbly, since I wrote the provision, that the Superfund law requires you, the trustee, to retain the money you recover from natural resource damage cases, and use it to restore the damaged natural resources. Is that your understanding as well?

Mr. EHLER. That is correct.

Mr. STUDDS. Now it is also my understanding that OMB thinks otherwise, and has so far blocked the setting up of a trust fund for you in Massachusetts.

Allow me to quote from a letter to OMB from the Commerce Department on this point.

"On October 7th, 1988, the Department of Commerce requested that OMB establish a trust account in the U.S. Treasury to collect and disperse recoveries for natural resource damages. Your staff advised us that our request had been denied since OMB believes that Superfund could be used to meet NOAA's requirements. We have reviewed your recommendation and have concluded that the Superfund cannot be used by NOAA to meet its requirements."

In other words, you believe that a special account is needed for you to carry out your obligations under the law, and OMB has refused, for more than seven months, to allow you to create that account. Is that correct?

Mr. EHLER. That is correct.

Mr. STUDDS. Do you agree that what happens in New Bedford could be extremely important as a precedent for what happens in other parts of the country?

Mr. EHLER. Yes, sir.

Mr. STUDDS. I guess at this point I can only repeat what I said earlier, that the law is the law. Ultimately, it is the President who must be held responsible for upholding the law. That happens to be his job.

I hope all of you here, who represent Federal agencies, will take back the message that this Subcommittee expects the law to be obeyed, OMB or no OMB. One more question before we move on, I guess for NOAA, and perhaps for Massachusetts. You do not mind being called "Massachusetts," do you?

Ms. BRECKENRIDGE. No, sir.

Mr. STUDDS. Can you tell us what, at this point, you expect to be able to do with the money recovered in the New Bedford case, assuming you do recover it. How do you plan to restore the fisheries in the harbor, and would you begin that process before, during, or after the actual cleanup of the harbor, and how long do you expect it to take?

Ms. BRECKENRIDGE. Obviously, we, in Massachusetts, do fully expect any monies recovered to be set aside in some kind of joint account since the United States and Massachusetts are acting as co-plaintiffs and co-trustees in that case. The precise use of those funds has not been determined. It is in the brainstorming stages. Various members of agencies within Massachusetts, especially from the Fisheries Department, and from the Wetlands Division in the Department of Environmental Quality Engineering, have been involved in discussions with NOAA about how those funds would be used.

We should be able to move forward, even more definitively, soon. We expect to have an official trustee appointed in Massachusetts. This is not something that has been done. In essence, staff members of various agencies have been serving in that capacity, and coordinating through the Attorney General's office.

We do not know precisely how the funds will be used. I fully expect that some kind of plan would be developed, shortly.

Mr. STUDDS. Do you want to add anything to that, Mr. Ehler?

Mr. EHLER. Yes. I would only add that the restoration planning process is a public process that will involve a number of interested parties, but the intent, I think, of both the Commonwealth, and certainly NOAA, is to use those funds solely for restoration purposes, restoring primarily the lobster fishery and the bottom fishery resources of the area.

Mr. STUDDS. As trustees, to what extent are you people, and the people you represent—your agencies—involved in EPA's selection of a cleanup plan for the harbor, if any?

Ms. BRECKENRIDGE. Heavily involved. Certainly, the Office of Incident Response, which is the counterpart of EPA in carrying out Superfund activities in terms of response measures, reviews all of the decisions that are being made along the way, and has direct input into what those decisions are, and has definitely been involved all along.

Mr. STUDDS. Mr. Ehler.

Mr. EHLER. One of the missions of our coastal resource coordinators in these regional offices of EPA is in fact to advise EPA on remedial and cleanup actions at various Superfund sites, including the New Bedford site, so we have been involved in that process.

Mr. STUDDS. Thanks. I want to go on, before I turn to other Members, to the question, generally, of funding. The National Response Team recently issued a report to the President—I am sure you are all familiar with it—concerning lessons we might learn from the *Exxon Valdez* spill.

Among other things, it recommended—and I quote: "That in future spills, damage assessment and restoration should begin immediately, and funding options should be identified quickly."

It also recommended—and I quote: "That Federal agency damage assessment capabilities should be strengthened."

Let me ask, first, NOAA and Interior—forgive me for addressing you institutionally—how many full-scale damage assessments have each of you conducted, to date, on oil spills and on Superfund sites? Full scale we are talking about here.

Ms. HOFFMANN. Full scale?

Mr. STUDDS. Right.

Ms. HOFFMANN. None.

Mr. STUDDS. Ms. Hoffmann, I cannot hear you. I am sorry.

Ms. HOFFMANN. I am sorry. From Interior, none.

Mr. STUDDS. None.

Ms. **Hoffmann**. We have never conducted a full-scale damage assessment.

Mr. **Studds**. OK. Mr. Ehler.

Mr. **Ehler**. Well, in terms of Superfund sites, we have one to our credit.

Mr. **Studds**. One.

Mr. **Ehler**. That is New Bedford. And we have others in various stages of preparation. We have no full-scale oil spill damage assessments completed. We are certainly very actively involved, absolutely stretched to the limit, trying to do work on the *Exxon Valdez* spill.

Mr. **Studds**. So the total national score is one to nothing in favor of NOAA.

Ms. **Hoffmann**. Mr. Chairman——

Mr. **Studds**. I did not mean that that way. Don't be upset.

Ms. **Hoffmann**. If I may, I did want to say that we have gotten some success without completing the entire process, using these regulations.

Mr. **Studds**. I understand. Is it fair to say that the primary reason your record has been—you can pick the adjective—is that the funding options referred to by the National Response Team are so limited? My adjective here was "dismal," but you look like such nice people this morning, I did not want to use that.

Mr. **Ehler**. Well, the facts are, in terms of monies available, at least within the Department of Commerce, specifically within NOAA for damage assessment, currently are zero.

Mr. **Studds**. Zero.

Mr. **Ehler**. We have no funds available for any damage assessment, and when we do undertake these activities, we do so as a tradeoff of other program funds.

Ms. **Hoffmann**. The same is true for the Department of the Interior.

Mr. **Studds**. Well, in light of that—I ask this, tremblingly—would this Administration support an amendment to the Oil Spill Liability bill, that would permit that fund to be available, up front, to finance damage assessments for major oil spill incidents?

Ms. **Hoffmann**. There is such a provision in the Administration's oil spill bill, and we do support it, sir.

Mr. **Studds**. It is a good thing I am in a secured chair. Does NOAA have a position on this?

Mr. **Ehler**. Well, I certainly cannot speak for the Administration. Personally, we would be in favor of any opportunity to obtain money for damage assessments.

Mr. **Studds**. Before I fall over, in a complete faint, let me ask EPA: Although I know your agency led the fight against this in the past, now that we have entered a new post-Reagan, post-*Exxon Valdez* era, would your agency support an amendment to the Superfund law, to allow money from that fund to be available for damage assessments for Superfund sites?

Ms. **Wise**. Well, as you say, in the past we have not supported it because of concern for the depletion of the fund, but I think, as you say, we are in a new era, we have a new Administrator who is emphasizing ecological concerns, and we are at this point already starting to talk to our Administrator about reconsidering our positions. But we cannot say that——

Mr. STUDDS. I am less surprised.

Ms. WISE [continuing]. We cannot say at this time what the Administration's position is.

Mr. STUDDS. Heaven forfend. Well, let me just say that that is the least discouraging statement from the Administration that I have heard.

Ms. WISE. Let me say one thing, though, if I can, to add to that. The reason for our concern in the past has been, to some extent, the amounts of the claims.

For example, in 1984, the agency was told that it must consider a $1.2 billion claim from one State, and those amounts could rapidly——

Mr. STUDDS. But my question had to do with damage assessments, not restoration, at the moment anyway.

Ms. WISE. Right. Well, I think that, as you said, we certainly are reconsidering that position.

Mr. STUDDS. I appreciate your inability to say any more than that. I am tempted to——

Mr. EHLER. Mr. Chairman, could I just add one point to that.

Mr. STUDDS. Certainly.

Mr. EHLER. I think that there are certainly alternatives to the use of Superfund, that should also be considered as an alternative to providing "up front" costs for damage assessments. A separate fund, certainly, might be as appropriate, if not more appropriate, and a more efficient solution.

Mr. STUDDS. That certainly is an alternative. I want to commend the Department of Interior, at least, and NOAA, for having a position on something of consequence. This is a first, this year, and it is a source of some encouragement. We have been told in the past by your agencies, on matters of equal importance, that the Administration was "in the mode of reacting." I believe that was the verbatim quote. And I think the President has enough middle names without adding "maybe" to the list. I would encourage EPA to encourage whoever it is that needs encouraging.

Finally, in my round, for NOAA. I understand that you have performed a survey of the other Superfund sites where there may be damages to coastal fisheries and other resources under your trusteeship.

The Wildlife Federation spokesman, a moment ago, and I think someone else, mentioned a site in southern California where the statute of limitations is about to run out if you do not get an assessment underway soon. Can you tell us more about that situation, and how is NOAA currently handling the other sites, given your absolute lack of funds?

Mr. EHLER. Well, I would rather not say too much about the site that we have under consideration, other than it is a fact to fact, and we are beginning the process to begin work there, again, using existing base program funds to do that work.

We have a number of other places that we have identified through our review process, which is a rigorous one that has taken place, now, over a period of 4 or 5 years, and, again, subject to the availability of funds that we can trade off within our agency, we will undertake those studies. Commencement Bay is certainly a place that may as well be——

Mr. **Studds**. When does the bell ring in southern California?

Mr. **Ehler**. I am sorry?

Mr. **Studds**. When does the bell ring? When does time run out?

Mr. **Ehler**. I believe next year. I cannot give you the precise date, but I would be happy to supply that for the record.

Mr. **Studds**. The gentleman from Pennsylvania.

Mr. **Weldon**. Thank you, Mr. Chairman, and I applaud you for holding this hearing today on a topic of extremely important significance to our country, and I thank the witnesses for testifying.

My opening questions will be in response to the situation in Alaska, and then I have a couple of general questions. I was in Prince William Sound for five days with the Secretary of the Interior and the Congressman from Alaska, approximately two weeks after the Valdez incident, and had a chance to see, firsthand, what was happening, and what our response was, and to see, firsthand, some of the monumental problems that occurred, that should never have occurred, allowing this incident to have such a tremendously large, negative impact on the environment in Alaska and the Prince William Sound area.

I am interested, first of all, in the comments and the testimony from you, Ms. Wise, about the specific control and the on-scene commander in the *Exxon Valdez* incident. Your comment on page two is, "The Coast Guard is the on-scene commander," and that they had the authority and should have been there, very quickly, acting and coordinating all Federal cleanup and environmental control efforts.

And to the contrary. What I heard both there, on site, and in testimony here, in other subcommittee hearings, was that we had no one really in charge, and that there was no on-scene commander, and that for three days, what we saw, and what I heard, was a lot of fingerpointing between Exxon, the State of Alaska, and the Coast Guard, about who was at fault and who should have done what when.

We have tried to correct that with a bill that Don Young and I have introduced regarding the specific situation in Alaska, but I am just a little puzzled by your statement that, in your opinion, the Coast Guard was in charge from the beginning.

I have been led to believe that the specifics of the Alyeska agreement provided for that situation not to be the case, that the Coast Guard was in fact not given that responsibility. So would you clarify that for me.

Ms. **Wise**. I would like to call on Tim Fields from our Emergency Response Office to answer that question, if I may.

Mr. **Fields**. Yes, Congressman, the National Contingency Plan and the Alyeska plan, as well—those plans for Prince William Sound provided for the responsible party—Alyeska—to provide for a response. However, the EPA, or Coast Guard OSC, when a response does occur, always has the authority to take over that response, if they believe that a responsible party is not doing an effective job in cleanup.

A judgment was made in the beginning stages of the Prince William Sound oil spill, by the Coast Guard on-scene coordinator, that the responsible party was doing an adequate job, initially, in dealing with the spill situation.

Therefore, the Coast Guard on-scene coordinator did not federalize, or take over that spill event. He decided that the appropriate role for the Coast Guard OSC was to be the oversight of that responsible party cleanup.

Mr. **Weldon**. So you have answered the question, in other words, that the Coast Guard had the authority but chose not to exercise that authority.

Mr. **Fields**. That is correct.

Mr. **Weldon**. And therefore, I think there is an obvious shortcoming on the part of the Coast Guard on-scene commander, who I assume was the captain of the port, in not exercising more jurisdiction and more responsible action at a quicker point in time following the incident.

Because what occurred in the first three days, it is just unbelievable that that kind of a situation could develop without a more appropriate and more aggressive response among all the parties. But certainly, what we have heard is that no one had the authority, and what you are saying is, they did have the authority but just did not use it.

I thank you for clarifying that. I have a question that I will open to anyone. A concern that I have is that in the case of the *Exxon Valdez*, we have a ship—and even though Exxon has done a tremendous amount of environmental damage in that area, I guess the one "saving grace," if you will, from this whole incident is that what I think will wind up being about a half a billion dollars, at a minimum, to pay for this cleanup, and all the related costs, we have a corporation that has the wherewithal to provide the funding for that cleanup effort.

I have a great deal of concern for foreign-flag tankers coming into American ports.

I was the mayor of a port town fo. 5 years in Marcus Hook. In 1975, we had the largest incident in America, where a chemical-carrying tanker rammed a docked oil tanker. The ship burned for three days. That 300,000 barrels of Algerian crude. At the time I was assistant fire chief. We had tremendous environmental damage, and we were only able to go after the Egron Queenie [phonetic] for the value of the ship and its cargo because it was a separately incorporated entity.

My grave concern is, with Liberian-flag tankers coming into all of our port areas, and Panamanian-flag tankers—are you all comfortable that our regulations currently are such that we have the protection for those kinds of vessels, with the crude that they are carrying, and the products they are carrying, in case of a major disaster like the *Exxon Valdez*, or like the one that I experienced, where two tankers collided while one was docked at a port? Are you all satisfied that we are doing all that we can with foreign-flag vessels, and if not, what should we be doing with foreign-flag ships coming into our ports?

And I will open it up, whoever wants to take the first stab at it.

Mr. **Olson**. Erik Olson from National Wildlife Federation. That is one of our major concerns. The 311(k) fund, as you probably know, is down to less than $5 million. That is clearly not going to be enough to respond to an incident of the kind you are referring to. So we think one thing that Congress ought to do is swiftly enact comprehensive oil spill legislation.

We do not think that $500 million is going to be enough. We think probably $1 billion is a better size for the fund. But right now, if the *Exxon Valdez* were to happen with a foreign-flag vessel in a port like you were talking about, there would not be the money from the Federal budget to pay for any cleanup activities.

Mr. WELDON. Well, I could just add to that, as the mayor of the town of 3,000 people, that was responsible for the land site cleanup and the control, there was no way that we could begin to deal with the emergency of the fire, let alone the environmental damage that was occurring, and what I am telling you, as Federal agencies officials, is if we do not look at that, you are just inviting a major, monumental catastrophe to occur, far in excess of what happened with the *Exxon Valdez*.

Because especially on the East Coast—and my colleague from New Jersey was here earlier, and my other colleagues from the East Coast are here now—we have foreign-flag vessels coming into our ports every day, and I am concerned because the safety standards on those ships are not what our standards are. They do not have the liability backup that they should have, and most of them are incorporated as separate entities, so that when an incident occurs, once you have the value of the ship and its cargo, you are done. There is no other available funds to go after, in terms of dealing with that situation.

And for that reason we have to address this concern. Would any of the other agency people like to respond to that?

Mr. FIELDS. EPA, again. Just one additional. We have acknowledged in the report that was mentioned earlier, the report to the President by the National Response Team, Administrator Reilly, Secretary Skinner, that contingency planning needs to be strengthened in this country. We have acknowledged our response mechanisms, cleanup approaches need to be strengthened, as well as response coordination, not only for the foreign vessels that you are talking about, but also domestic vessels, we have a concern.

We have initiated a review of all of the 48 contingency plans for the major ports of the United States to assure that we have got proper plans in place if a major spill does occur.

So we are concerned, as you are, about all vessels. We are reviewing the contingency plans, and will be providing a report over the next several months about whether or not those plans for equipment, people, resources needed to respond to major events is adequate. That is being done, and we have some of the same concerns you have. We want to make sure we are prepared when the next *Exxon Valdez* spill does occur.

Mr. WELDON. Well, let me just say as a follow-up on that point, and you have raised an issue that I want to focus on, which is emergency response, because that is of prime concern to me from an environmental standpoint and also from a life-safety standpoint.

I would hope that the National Response Team is a little more able to respond today than it was perhaps 10 years ago. In the same community where I was the mayor, where I have the world's largest underground storage of LPG gas, 2 million barrels stored in granite caverns, we had an incident occur where the refinery overfilled one of the caverns and pumped it up into 60 people's basements on a Saturday afternoon.

I called the EPA to get them to respond on a Saturday, and to get the response team to assist me as a local mayor, and the response to me was, "We don't work on weekends. Call us back on Monday and we'll send someone out to assist you."

There was I, the mayor of a small community, with no idea how to deal with this huge monumental incident, with 60 families vacated from their homes, ended up being two months out of their homes. Not being able to determine, number one, what the product was coming into their basements, and, number two, what to do about it. And so I would hope the response team of EPA—and I applaud the leadership of the new Administrator, I think it is an excellent choice—but I would hope you would keep that in mind.

As someone with local Government experience, my experience with the National Response Team in the past has not been very good, and while we may have high ideals, I hope we translate that into reality when incidents occur.

The next thing I would like to talk about is, that I am not satisfied that we have the research underway to deal with oil spills, and this has been brought up in other hearings, and it is not the appropriate subject for this hearing. But if there is any comment on that. We talk about what to do in the event of an emergency. I do not think we know what to do, because I do not think the research has been done to allow us to understand which technology will work, whether it is dispersants, or burning off, or skimming, or whatever.

And in fact with the *Exxon Valdez*, we were conducting on-scene testing between the Coast Guard, the State of Alaska, EPA and other agencies, while we had 11 million gallons of oil flowing all over the Prince William Sound area. That is unacceptable. It is immoral, in my opinion.

What are we doing, now, to deal with the issue of research on oil-spill technology in your individual agencies? Maybe Interior would answer that for me.

Mr. STUDDS. Let me just caution the gentleman, if I may, that if we are going to get into everything that is outrageous, immoral, et cetera, that we are going to be here a long time.

Mr. WELDON. I will try to limit my questions to germaneness of the issue.

Mr. STUDDS. Thank you.

Mr. WELDON. But if I could get that one response, perhaps maybe for the record, if you would submit to me what new things we are doing in the area of research, because it is of great concern to me.

Mr. WELDON. I do have one other line of questioning that does deal with this specific incident, and that is the emergency response aspects, especially in relationship to the Superfund reauthorization.

SARA Title 3 specifically provided that local municipalities must provide training and must provide resources for local emergency response groups to deal with incidents of this type.

Yet, as someone who is very actively involved with these groups around the country, my estimation today is that fully 80 percent to 85 percent of the municipalities in America are totally out of compliance. They are out of compliance because we did not put any money in to train the emergency response personnel to deal with the situations, and we did not put any money in the legislation to provide any of their resources.

So we are telling them to be prepared, have these plans in place, but don't tell us where you are going to get the funding for them, and don't tell us where you are going to get the resources. And so perhaps you would comment on that, maybe perhaps EPA would comment on that.

Mr. **Fields**. That is obviously a concern that has been raised to us by States, localities. As Ms. Wise indicated earlier, regarding the issue of the past position on natural resource damages, the whole area of Title 3 funding is an area that we are looking at very carefully for 1991 reauthorization. The agency will be revisiting its position and looking at the whole issue of funding for State and local Governments for emergency response purposes in the new reauthorization process.

Mr. **Weldon**. Well, I applaud you for that comment, and I would say that if we do not look at that, then we might as well ask Congress to reverse the legislation, because having a bill on the books that sets up these requirements for local Governments is absolutely unbelievable, and we do not give them the support they need to implement it, and I can tell you the frustration is very high all across America. Thank you, Mr. Chairman.

Mr. **Studds**. Thank you. The gentleman from New York.

Mr. **Hochbrueckner**. Thank you, Mr. Chairman. As you have noticed, there is a major concern about the funding for the damage assessment now. Mr. Olson, of National Wildlife Federation, suggests that the best way—in fact of his three suggestions, his first one is that the best way to obtain the funding is to amend the Superfund legislation.

I would like a comment from each of you, if you would, if you agree that that is a very direct and easy way to provide the initial funding for the damage assessments, or, if you do not agree, what other suggestions might you have in terms of a good way for us to have the money. Because obviously, if we do not do the assessments, the opportunity for prevailing overall in restoring a site is greatly diminished.

So what would you suggest? Why don't we start with Ms. Hoffmann.

Ms. **Hoffmann**. I do not know that there is an easy way to get funding for anything in these days. As Mr. Ehler suggested, I think that funding from Superfund or the oil spill fund, if it is an oil spill, is one possibility. But I think a separate fund, as Mr. Ehler suggested, is also a possibility, or, increase the appropriations for the trustee agencies.

Mr. **Ehler**. I think there is an alternative that works, in fact has worked in the *Exxon Valdez* incident, and that is to approach the responsible party to fund these kinds of assessments right up front. In the case of Exxon, that worked. It has worked well so far.

The understanding is that the $15 million that they have provided in this case is a down payment, and not the total bill of the assessment, but it certainly has been an innovative mechanism which, in the case of a very large and responsible corporation, in this sense, is an alternative that should be pursued in other cases.

Mr. HOCHBRUECKNER. How about if you are dealing with an irresponsible——

Mr. EHLER. Obviously it would not work, and there would have to be other means available.

Mr. HOCHBRUECKNER. Any suggestions on the other means, other than Superfund?

Mr. EHLER. Well, I already suggested a separate trust account. I think if that is not feasible, for any reason, then money has to come from somewhere, and I guess we are talking about additional appropriations.

Mr. HOCHBRUECKNER. So that would be a separate trust fund set up by Congress and the President?

Mr. EHLER. Well, again, personally, I think we need such a mechanism for restoration which has already been discussed, but also for assessment.

Mr. STUDDS. Will the gentleman yield for a moment. How are you suggesting that that be funded? Out of general appropriations, or some other way?

Mr. EHLER. No; no. I think that it would be established in a very similar way to the way Superfund works now, as a tax, if you will, on the industry.

Mr. JOHNSON. Attached to my longer statement are resolutions from the National Association of Attorneys General suggesting very short and easy amendments, that would allow funding of such assessments.

Superfund and CERCLA already have the mechanism in place. It is merely the funding mechanism which needs to be changed by eliminating one or two letters, essentially, in the statute, and that could probably be more easily accomplished than trying to set up a new fund with new accounting, and all the attendant costs that accompany that.

Our experience in New York has been that, generally speaking, responsible parties are not particularly interested in funding natural resource damages because, in effect, you are asking them to give you the funds to prove that they owe you more money, and they are not generally pleased to do that.

They prefer not to do that. And so an alternative source, other than the responsible parties, we think, is essential to get the program moving forward at both the State and Federal level, particularly at the Federal level.

However, our experience in New York has also shown that there has to be movement from the top of the Federal agencies involved. In one particular instance in New York, where the State has recovered money, we have asked the Department of Interior, for instance, to give us its ideas, and to come up with a program about what to do, and that we could use some of our own monies to help it do assessments, and so far we have not gotten a response from it.

Mr. OLSON. I would like to just briefly respond. Obviously we would favor opening the fund, and we think it is—as Mr. Johnson said—very easy to do.

Another bill that has been introduced, the one I referenced, introduced by Peter Smith of Vermont, would allow the trustee to go directly to the responsible party and demand the money for the assessment, and treble damages would be available to the trustee if the responsible party failed to pay those monies up front.

That is something you might want to look at. I do not think it would be wise to have that the exclusive remedy because that obviously will take some time, in some cases, with a recalcitrant responsible party. But it would make sense, as an alternative, to just having an enormous amount of money coming out of the fund.

Ms. WISE. From EPA, I would say that an alternative, again, to Superfund, would be separate appropriations for the individual agencies, and that they would be responsible for obtaining those appropriations in the President's budget.

Mr. OLSON. The obvious problem with appropriations is, in the case of an *Exxon Valdez* or something, you do not want to have to go to Congress and ask for an appropriation every time there is a major oil spill.

Mr. HOCHBRUECKNER. Thank you, Mr. Chairman.

Mr. STUDDS. I am going to go to the gentleman from Maryland who has been here most of the day, and come back to the gentleman from North Carolina. The gentleman from Maryland.

Mr. DYSON. Thank you, Mr. Chairman. Mr. Chairman, I have some prepared questions, and I will ask them, and if it gets too long, I would ask that they be a part of the record.

Mr. STUDDS. Without objection.

Mr. DYSON. Thank you. Let me continue on with my colleague from New York's line of questioning. If a company is paying for the assessment—which I understand is what is happening in Alaska, with Exxon paying about $15 million for the resource damage assessment—that company is going to want to have some say in how the damages are calculated. I certainly would, if I was paying for it.

Yet, I heard this lady here—who I think is representing EPA today—recommend a separate appropriation for each agency. Now, I do not think there is any way that is going to happen under this Administration. I really do not. I think you are barking up the wrong tree. But short of that, do you have any other ideas as to how—I mean, the damage assessment system, is going to work.

Going back to what Congressman Hochbrueckner, and some of the rest of us have been saying: If the assessment, funding is primarily left up to the company—what do you do? Are they already asking for some kind of control over the assessment?

Mr. EHLER. From NOAA's standpoint, we have certainly been actively involved in the damage assessment process, in the negotiations with Exxon, initially, and in the agreement with Exxon. In no way has Exxon constrained the procedures or methods, nor have they really insisted on a review of any of that work, to date. I mean, we have seen no evidence of that.

It is basically an unconditional agreement, in terms of them providing that $15 million to the——

Mr. DYSON. Let me interrupt you there. This is a unique situation. I mean, this is the largest spill of its kind in the history of this country. They are somewhat constrained by the press attention that has been given to it. They really probably could not try to influence the Valdez assessment. Let's take a smaller spill, one that is not going to get the kind of attention—maybe as our friend over here talked about in his town.

Are they not going to ask for some say-so in it? I mean, you are not going to find a believer up here if you tell me "no."

Mr. EHLER. That is a pretty hypothetical question and——

Mr. DYSON. Oh, I know. But I, we never thought the *Exxon Valdez* incident would ever happen, and it did. You know, these kinds of things are going to happen and you are going to be faced with it.

Mr. EHLER. Let me just add two points.

Mr. DYSON. Ms. Hoffmann looks like she is really anxious to answer.

Mr. EHLER. Can I just add——

Mr. DYSON. If you do not hurry, we are going to go to her.

Mr. EHLER. Let me just add two statements to your question. Number one, in the case of the $15 million agreement, $15 million has been termed a down payment. I mean, there is no understanding that that is the final bill for the assessment, and in fact it is likely to be much higher, and Exxon has agreed to at least consider the total bill, not just $15 million.

Ms. HOFFMANN. I agree that the problem is with smaller spills that either are less public at the outset or quickly become less public, but there is a provision in our rules for the plan for a damage assessment to be public, and for all of the steps of the proceedings to be public, and we feel that that is sufficient insurance to be sure that the responsible party is not jerking people around.

Mr. DYSON. Let me ask you another question. Who negotiates these arrangements? Who negotiated the Valdez assessment, which department, with the Exxon Company?

Mr. EHLER. Well, the agreement with Exxon was reached through a fairly complex negotiation that involved Justice, it involved NOAA, it involved some of the other Federal trustees——

Ms. HOFFMANN. Interior.

Mr. EHLER [continuing]. And all of the trustees before the final agreement——

Mr. DYSON. Well, that was my question, really. I knew Justice was involved. I was wondering whether agencies of the Government——

Mr. EHLER. I think it is fair to say that all of the trustees were involved.

Mr. DYSON. All?

Ms. HOFFMANN. Interior. Agriculture.

Mr. DYSON. And you are saying——

Ms. HOFFMANN. And the State.

Mr. DYSON [continuing]. Coming up with that assessment, that they were involved in that part of it, not just——

Ms. HOFFMANN. Yes. They are still involved with it. They have been involved, together, coordinated, on the ground, in Alaska, since the spill started. There have been very good arrangements there, not all of them obvious to the public. But the cooperation on the ground amongst bureau and office people in Alaska, with the State, has been pretty good, and continues to be good. We are expecting a plan for the damage assessment some time in June, and regardless of how the assessment proceeds, regardless of how the parts of it may be divided up, the various trustees know, at this time, what each other is doing, and that is the purpose of having a plan and having it public.

Mr. JOHNSON. From the States' perspective, one of the problems, though, is the regulations. The companies, in some sense, do not have to worry too much about getting their positions put forth during planning of the assessment because the rules are so favorable to them, that if the assessment follows the rules they have very little to fear.

The assessment will not generate very much damages, and in most cases it is almost as good as the companies planning everything from the get-go on how they would like to do everything so as to minimize their damages.

Already the States have found out that particularly in dealings with the Department of Defense, and its dealings with responsible parties—for instance, in Colorado and Ohio—it appears that natural resource damage assessment agreements, between the Department of Defense at Federal facilities and the responsible parties, will require assessments to be done pursuant to the regulations.

And the net result for the States will be—we are afraid at least—will be very limited recoveries to protect the States' natural resources, and that is what particularly scares us.

Until those regulations are changed to reflect the true scope of damages, the companies already have a big advantage in saying how the assessments are going to be done, because they are going to say "Follow the regulations," and the Federal agencies, so far, have generally said, "Yes, there are regulations, we feel constrained to follow them even though they will not, in our opinion, yield an appropriate damage amount."

Mr. DYSON. Let me ask you real quick, relative to defense establishments what regulations are you talking about? Are you talking about DOD regulations, or the other agencies that normally handle environmental damages?

Mr. JOHNSON. They would be the Department of Interior regulations that, for instance, the Department of Defense would use when assessing damages at the Rocky Mountain Arsenal, let's say, or another large defense establishment which, over the past years, has severely damaged natural resources.

Mr. DYSON. Mr. Chairman, if you do not mind, if I could continue. I would like to ask Ms. Hoffmann some questions that I have prepared, that our staff has prepared here, and I think you may have answered this in response to a question the Chairman asked. But I was wondering if the Department of Interior has identified or surveyed any sites in the State of Maryland where damages to natural resources need to be assessed or restored?

Ms. HOFFMANN. I am sorry, Mr. Congressman. I would have to answer that for the record.

Mr. DYSON. OK.

Ms. HOFFMAN. I am pretty good at keeping things in my head, but I do not happen to know the answer to that.

Mr. DYSON. Well, then, the rest of my questions relate to Maryland and the Chesapeake Bay, and we will give those to you, and if you can answer them——

Ms. HOFFMAN. I will be happy to research them for you.

[The information requested can be found at the end of the hearing.]

Mr. DYSON. I have one other for Mr. Ehler from NOAA. This is on page eight of your testimony. You mention the spill from barge 565 in the Chesapeake Bay. On that page you went through a number of spills and the reference to 565 was I think at the end of that very long paragraph. That one sentence in that very long paragraph.

Could you elaborate on the use of the model in that case, and what is the current status of that incident? Is this the spill where the fuel basically stayed on the water's surface and later evaporated? Am I talking about the same one?

Mr. EHLER. I believe we are talking about the same spill. It was used in my written testimony as an example of some of the problems of applying these so-called simplified methods, which is a model of the effects of spills.

In this particular case, the barge you mentioned was being towed around the Chesapeake Bay and discharging oil on the surface, and as I remember the particular incident—and I would be happy to supply more information for the record—I think the model just was not very accurate at predicting the effects of that particular incident.

This is a very complex business we are in. Simplified assessments have to be used when at least our initial assessment of damages are that they are not going to be significant. It is not an unreasonable approach to take if the facts are that it does not work in all cases, and that was used as an example of one of those problem cases that we have had.

Mr. DYSON. I will let you answer, too, and then I will be finished, Mr. Chairman. So were you not able to do an assessment, then?

Mr. EHLER. I believe the model was applied. The problem is——

Mr. DYSON. But you said it is not effective or it——

Mr. EHLER. The estimate of the damage, if you will, or the effects of that particular incident did not bear out to be accurate. This is not the only case where that has occurred, and I think it is inevitable, when you try to use simplified methods on very complex situations.

Ms. HOFFMANN. I just wanted to say that I believe the State is still considering the use of the model. Some of our staff people were in Maryland a week or so ago, discussing with the State trustees the rule in general, but in particular, the application of the type A model. I do not recognize it by the barge number, but I think it is the same one. So we have been——

Mr. DYSON. I did not know the barge number, either. I just think I know the incident.

Ms. HOFFMANN. Yes. So I think the work still continues in that the model is still relatively new, and it is hard to understand its competence because it deals with averages so that if you use the model you cannot then go to the point in the bay that appears on your numerical screen. You cannot find a point that matches that. The point of it is to be averages for certain latitudes, certain provinces, as they say in oceanic jargon, and to use averages of many kinds of values, are built into the black box of the computer.

So we have not played that out the rest of the way in Maryland, but we have been counseling with your—we do not do assessments in our office, but our people have been up there talking to people in the State of Maryland.

Mr. DYSON. Well, Mr. Chairman, I am going to submit the rest of these questions, and I think they are parochial and it will probably be easier for the witnesses to answer them for the record, and I thank you very much for allowing me to do that.

Mr. STUDDS. The gentleman from North Carolina.

Mr. COBLE. Mr. Chairman, I apologize for my late arrival. I was a witness at another hearing, and I thought it was going to take between five and ten minutes, and that extended to an hour and five minutes. So that is why I am late.

Mr. STUDDS. I understand.

Mr. COBLE. I have no specific questions. When I came in Mr. Weldon was talking to you all. I just want to extend what he was saying concerning response. I just believe that we cannot, again, tolerate imprecise, ineffective belated responses to these sort of disasters.

I have heard it said—and this is a very insensitive statement—but I have heard it said in the Congress, "Well, it's a good thing that oil spill occurred in Alaska."

Now what they meant, of course, I am sure was, that the population is not nearly so enormous there. I am sure the people in Alaska do not share that conclusion, but who is to say that next time it will not be in Massachusetts, North Carolina, California, or wherever?

So, I just do not think we can emphasize, too strongly, the importance of a well-oiled precision as far as response is concerned. That is redundant. I know it has been said before. If you all want to add to that, I will be glad to turn a receptive ear to you, but that, Mr. Chairman, is all I have to say. But if anybody wants to respond to that, I will be happy to listen to you. I am sure you have said it before, prior to my arrival here. Thank you, Mr. Chairman.

Mr. STUDDS. I thank the gentleman. The gentleman from California.

Mr. HERGER. Thank you, Mr. Chairman. Mr. Ehler, I understand there has been some testimony in support of separate trust accounts financed by polluters to pay for damages assessments. Mr. Shumway has a bill, H.R. 2255, which does precisely that.

Do you have any comment on this proposal?

Mr. EHLER. Not beyond what I have already said, and my statement was that I personally think that that is an option that could be effective.

Mr. HERGER. You feel it could be self-financing?

Mr. EHLER. Well, the costs of assessments are recoverable as parts of settlements, and I think it could be replenished. I mean, the fund could initially be established through a variety of means, and then replenished through the recovery of these costs of assessment and then redistributed to the agencies, as needed.

Mr. OLSON. I would like to add something. My understanding is that would pay $750,000, establish that size fund, which probably would not even pay for a single assessment. That is the problem with that approach, is that you have got to have enough money in there to do assessments nationwide. Just a single assessment of NOAA's off the coast of California, off L.A.'s coast, would probably cost $1 million to $2 million.

Mr. JOHNSON. Also, the Department of Interior regulations limit the amount of recovery for the cost of assessment, that a trustee can recover following the regulations. While the statute says the cost of an assessment is recoverable, the Department of Interior regulations limit that recovery to situations where the cost of assessment is no greater than the amount of damages.

So in the event that you do an assessment and it turns out that you spend more money than the amount of damages you are able to collect, under the regulations you cannot collect those funds, and that would hurt any sort of fund in terms of replenishment. It is another serious defect in the regulations.

Mr. HERGER. Would you recommend, in general, that perhaps these regulations be changed, and perhaps be a lot more—your feeling is we need more than the $750,000 to begin with, and number two, we need the regulations to be changed to allow for this?

Mr. JOHNSON. There is no question, from New York's perspective, and the nine other States—Massachusetts and eight others that have challenged the regulations in the District of Columbia Circuit, that the regulations need to be changed, and we sought that relief in the courts. We expect to be successful, but in the event that we are not, we would certainly ask the Congress to act, to make sure that its intent, that assessments be done properly and fairly, and that the States and the Federal Government recover their true costs be accomplished.

Mr. HERGER. Thank you very much. It certainly would seem to me, and certainly to the people that I speak to, who are paying the taxes of this country, that they would much prefer to see those that are doing the polluting be paying the bill than have the rest of us pay that bill. Thank you.

Mr. STUDDS. I thank the gentleman. I have a couple of more topics I want to cover while we are all together, if I may. For a moment, on the Interior regulations. The President, the Secretary of Interior, and the EPA Administrator have all said, with varying degrees of fanfare—all great—that they want full restoration, not partial restoration, of the environment in Prince William Sound, and we all applaud that.

But let me ask each of you if you believe that we will in fact achieve full restoration, and full compensation for natural resource damages in Alaska, and in other pollution incidents, if we rely on the Interior Department regulations for measuring natural resource damages for oil spills and Superfund sites. This is a yes or no question. So each of you: Do the Interior regulations meet the President's publicly-announced standard of guaranteed full recovery?

Ms. HOFFMANN. Sir, it has never been proven that they have not.

Mr. STUDDS. Congratulations.

[Laughter.]

Mr. JOHNSON. New York does not think they will be able to accomplish it if they use the regulations.

Mr. **Olson**. We do not think so, either, and I would point out this is a real issue between the State and the Federal trustees as to whether those rules will be used, and any pressure Congress can bring to bear, to make sure the Federal trustees do not use the regulations, I think would be useful.

Mr. **Ehler**. In the case of Prince William Sound, I think that there is general agreement that the regulations provide an overall framework that can be useful in thinking about conducting the damage assessment.

Mr. **Studds**. You have been in the Government too long.

[Laughter.]

Mr. **Ehler**. On the other hand, there is no agreement, now, to actually implement the regulations. There are some problems, I think, in terms of the methods, particularly from the standpoint of the economic damage assessment, and the——

Mr. **Studds**. This was a yes or no question. Where, on the scale, between "possibly" and "no" is your answer?

Mr. **Ehler**. I guess the answer is possibly, if certain economic methods were modified.

Mr. **Studds**. You are in the right Administration. Massachusetts?

Ms. **Breckenridge**. No. The Alaska oil spill really highlights the inadequacies of the regulations.

Mr. **Studds**. And EPA?

Ms. **Wise**. We would agree with Mr. Ehler.

[Laughter.]

Mr. **Studds**. Well, no one is losing their job today. One translation of—I have lost my list of names here. Forgive me. I have gotten into such a bad habit of referring to you institutionally, that I have depersonalized you.

One translation of what Ms. Hoffmann just said—I think it is fair to say—is that the regulations have never actually been used to measure natural resource damages in an oil spill case yet. Is that fair?

Ms. **Hoffmann**. That is right, yes. We have never taken them to completion.

Mr. **Studds**. I am not going to pretend that I fully, or even partially understand the exact nature of the shortcomings of those regulations. So for the purposes, hopefully, of my education, let me ask a couple of general questions about them.

The first is the question of the "lesser of" rule, requiring trustees to select the cheapest method of valuing damage. Perhaps the Department—now you are the Department—could first tell us what the rule is, and why you think it is reasonable, and then the Wildlife Federation and the State representatives could respond.

I want to remind you that if you assume complete ignorance on the part of this Chairman, you would be very close to the truth. So, try to respond, to the extent that you can, in English, notwithstanding the fact that we are speaking about regulations.

Ms. **Hoffmann**. Mr. Chairman, I am going to turn that over to Willie Taylor of our staff, but first, my attorney has directed me to remind the Committee that——

Mr. **Studds**. You have not been charged with anything.

[Laughter.]

Ms. HOFFMANN [continuing]. Some aspects of the regulations are currently under review by the U.S. Circuit Court of Appeals for the D.C. Circuit. Oral arguments were held before this court in February of this year, where the issues were fully briefed and debated. While awaiting a decision by this court, we have been advised by our Solicitor's Office and the Department of Justice to refrain from commenting publicly on the specific issues in the litigation. We welcome the opportunity to explain the assessment procedures established by the regulation, and that is the basis upon which Willie Taylor will answer your question about lessor of.

Mr. STUDDS. Is that a warning that he has no intention of answering it? Or is that——

Ms. HOFFMANN. Oh, no. It is a good answer. Wait.

[Laughter.]

Mr. STUDDS. Would you identify yourself for the record in so far as you are allowed to do so, please.

Mr. TAYLOR. My name is Willie Taylor. I am an economist with the Department of the Interior in the Office of Program Analysis.

Mr. STUDDS. Pull that mike closer. Thanks. Now what language do you plan to address the Committee in?

Mr. TAYLOR. Hopefully English.

Mr. STUDDS. OK.

Mr. TAYLOR. The rule of lesser of, and it is the lesser of restoration costs or use values, is based on the fact that CERCLA requires compensation, and compensation has normally been described in common law, and economics, as the lesser of lost-use values or restoration costs.

All sums that are recovered by using either method of measurement of damages, though, must in fact go to restoration. I do not know if that gets to your question.

Mr. STUDDS. Well, I think I have some questions, but I think I will let the others comment for a moment, because I suspect they will be the same questions. Go ahead.

Mr. OLSON. First of all, I wanted to note, for the record, that both NOAA and EPA, in their public comments on the regulations oppose the "lesser of" rule, is my understanding, and we cited those in our briefs in the case. So I am not sure why NOAA and EPA are being quite as reluctant as they seem to be.

But the other issue that I would raise is that we think that Congress, and, in particular, this Committee, spoke directly to this issue. The Committee's report, from 1985, directly stated that it was not the lesser of, that it was the cost of restoration plus lost-use values that should be recovered. So we believe it is fairly clear that Congress intended that the full cost of restoring the resources, plus the cost of lost-use values should have to be paid for by the polluters.

Mr. STUDDS. Would you elaborate, for the moment, on why you believe the "lesser of" concept is inadequate.

Mr. OLSON. Well, let's take the Valdez example as a good one. Under the "lesser of" rule, and the Interior Department regulations, you would look at essentially the market value of the resource, such as fur seals, which is $15 under the rules. You would compare that to the cost of restoring the fur seal rookery, which, in this case, might be several million dollars, or more than that, and obviously you would come up with the $15 times the number of seals for a replacement of those resources.

And that amount of money certainly is not going to be enough to do anything at that site. So the inadequacy is that market value or those lost-use values is so small, that you are not going to be able to restore the resources.

Mr. STUDDS. Massachusetts, is that an expression of wishing to say something on your face? I did not mean to——

Ms. BRECKENRIDGE. I would be happy to pitch in my two cents.

Mr. STUDDS. Don't be modest.

Ms. BRECKENRIDGE. It is quite clear that lost-use value in many, many cases will be much lower than the costs of restoration, just the way the regulations are set up. Now the question can be asked: Well, who says natural resources ought to be restored? Well, that is definitely to be found in the statute. I think it reflects the notion that public resources really are not just like, say, a private automobile. The insurance company says, oh, your car has been damaged, the market value has been diminished, we will pay the difference, feel free to go put it in the bank.

Well, the fact is, public natural resources are unique things, held for the benefit of the whole public. They need to be put back the way they were, and that is really a very different kind of notion. We are not just looking for dollars to put in the bank. We are looking for a resource, for natural resources as they were, and to do that you need to have an interpretation of the statute which will bring those monies, channel them back in in an adequate amount to put the resource back.

Mr. STUDDS. Would the Interior Department care to comment on the withering assault on their initial proposition?

Mr. TAYLOR. Yes, sir. We have in fact commented in the brief and we have discussed this issue both in the preamble and the brief. I believe that there is a bit of confusion in terms of the true issue being either market prices, or the "lesser of" rule, and I think there are two issues here.

The regulation does not in fact solely look to market values. It lays out a hierarchy and the preamble, as well as the briefs that we have presented to the court, explain and state that there is this hierarchy; however, in many cases we expect, and in fact in most cases we expect that there will not be a market price for natural resources.

The $15 fur seal is an example from the type A's where we had to come up with an average value to plug into the model, and that was the only value that was available.

Mr. STUDDS. That was presumably acquired without consulting other fur seals.

Mr. TAYLOR. That $15 is the part that we can measure based on the amount of the pelt, which we state inside of the regulations. There was in fact no other measurable value we had.

Mr. STUDDS. OK. I am sorry. Did you want to—you are recognized, unless that was your attorney.

Mr. TAYLOR. That was our attorney.

Mr. STUDDS. OK. We will go on, then. The second point of criticism, as I understand it, is that the things that are included in the category of lost uses are too limited because the regulations require that only committed public uses be counted.

Perhaps the Department could tell me, first of all, what is a "committed public use." What does that mean? I have never heard that phrase before.

Mr. TAYLOR. The regulation defines a "committed public use" as one which is either a current use of the resource, or one which has been documented through some budgetary, legal, financial, or other method to commit the resource to use in the future. Those methods range over any document which a local or State Government, or the Federal Government has, which commits the resource to a future use. But it is an either/or proposition, not both.

Mr. STUDDS. Does that include commercial fishing, for example?

Mr. TAYLOR. Yes.

Mr. STUDDS. What is an uncommitted public use?

Mr. TAYLOR. One which does not meet the definition.

Mr. STUDDS. One which is what? Oh.

Ms. HOFFMANN. Groundwater not used for drinking.

Mr. TAYLOR. Groundwater not used for drinking. Groundwater which is not potable.

Mr. STUDDS. OK. New York. You look anxious.

Mr. JOHNSON. That is precisely one of the things that is wrong with the regulations. Under the definition, if you have an aquifer that is not being used currently because development has not occurred in that area, or it is in the Adirondacks, or in a park, and as a result it is clean and no one is using it, and if that suddenly is a subject of a chemical spill and becomes contaminated, because there are no uses of that resource it would appear, under the regulations, that the trustee cannot recover to clean up that damaged natural resource because it has no current uses and no committed public uses.

At least that is how the regulations can be interpreted. The net result of that is, ironically, that somehow the cleaner and the less used the resource is, the less likely a trustee can recover to restore potential uses for that resource.

The problem with the regulations is that they ignore the fact that the trustees are holding resources for the public for future potential uses, whatever they may be, and that is why you need to restore the resources to their original condition, rather than just try to replace current uses that the resources have.

States do not have time to go out and catalogue all the uses that their resources currently have, or that they may have, and commit them to those uses.

Mr. STUDDS. Anybody else want to add to that?

Mr. OLSON. I would like to also add to that. We are interveners, as you know, in the New Bedford Harbor case.

This issue, if you posed it in the case of New Bedford Harbor, you do not have a current use of—for example—the lobster fishery because it is closed.

You may not have a committed future use of that fishery because nobody has put a document together that commits future use of those lobsters. Therefore, you would not be able to recover the lost-use value.

Mr. **Studds**. I am going to conclude in a moment, unless anyone feels very strongly that they have something that ought to be said, they would like to say, that has not been said.

I will give anyone an opportunity to do that, if you wish.

[No response.]

Mr. **Studds**. Let me just say, in summary, that based on what we have learned today, it seems to me we have a lot of work to do. Natural resource damage assessment and compensation is important to our taxpayers and to our environment, and the laws we have are clearly not being implemented. But even if they were, they would not get the job done, as far as I can tell.

We need to apply the same basic principles this Administration has embraced for Prince William Sound to other pollution incidents around the country.

Assessments should begin immediately. They should be financed by the polluter. The goal should be full, not partial recovery of damages. There should be close cooperation between those whose chief responsibility is to clean up pollution, and those who serve as natural resource trustees.

There should be close coordination with the States. We are a long way from achieving those principles, as simple as they appear to be when stated that way. I hope very much we have taken an important first step this morning.

I want to thank all of you, especially those of you who have some strong differences with some of your colleagues on the panel, from refraining from physical violence. We appreciate that.

Thank you, kindly, and we look forward to working with each of you in the months ahead. The Subcommittee is adjourned.

[Whereupon, at 12:02 p.m., the Subcommittee was adjourned, subject to the call of the Chair.]

STATEMENT OF CECIL HOFFMANN, SENIOR ENVIRONMENTAL PROTECTION SPECIALIST, OFFICE OF ENVIRONMENTAL PROJECT REVIEW, OFFICE OF THE ASSISTANT SECRETARY FOR POLICY, BUDGET AND ADMINISTRATION, DEPARTMENT OF THE INTERIOR, BEFORE THE HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES, REGARDING THE NATURAL RESOURCE DAMAGE ASSESSMENT REGULATION

May 25, 1989

Mr. Chairman, I am Cecil Hoffmann, from the office of Environmental Project Review. Here with me are two staff members from our office who were members of the team that wrote the natural resource damage assessment regulation -- David Rosenberger, and Linda Burlington. Willie Taylor, an economist from the Office of Program Analysis was also a member of that team, as was Pete Escherich, now with the Fish and Wildlife Service Evironmental Contaminants group.

We are pleased to have the opportunity here today to focus on the natural resource damage assessment rule developed by the Department of the Interior for the use of natural resource trustees as authorized by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act (SARA).

It is the responsibility of the Office of Environmental Project Review to continue developing and maintaining the natural resource damage assessment regulation. We also provide training on the use of the rule for State and local officials as requested. This office does not do damage assessments for specific cases, we offer technical assistance in the ways the rule works. This Office also coordinates the Department's National and Regional response activities to such spills or releases largely through its field network of (9) Regional Environmental Offices.

My statement today will consist of a brief description of the basic precepts of the rule, followed by a broad outline of the rule's coverage, highlighting the nature of the rule. I will talk briefly about what is evolving as to the roles of natural resource trustees, and some of the applications of the rule we are seeing in the relatively short time since the rule became final. Finally, I will talk briefly about our procedures for addressing natural resource injuries resulting from hazardous waste sites. Coverage of the relevant subjects makes for a lengthy statement, so I will summarize key issues as briefly as possible. First, to the regulations as written.

There are two kinds of regulation, described in the law itself as follows:

> Such regulations shall specify: (A) standard procedures for simplified assessments requiring minimal field observation, including establishing measures of damages based on units of discharge or release or units of affected area, and
> (B) alternative protocols for conducting assessments in individual cases to determine the type and extent of short- and long-term injury, destruction or loss. Such regulations shall identify the best available procedures to determine such damages, including both direct and indirect injury, destruction or loss and shall take into consideration factors, including, but not limited to, replacement value, use value, and the ability of the ecosystem or resource to recover.

The divisions in this section of the law have become the designations for the two types of procudures. Type A are the "standard procedures for simplified assessments". The Type B procedures provide alternative methodologies for "conducting assessments in individual cases."

The Type A procedure is intended to be easy to use to assess the natural resources damages based on the amount of the substance released and the kind of environment it was released into. The Department has developed one Type A procedure, which incorporates the use of a computer model for spills or releases into coastal and marine environments. The program is available on discs for use in a personal computer, and thus can be made widely available.

The Type A computer program contains within it all the elements of a natural resource damage assessment that are to be implemented step-by-step when a trustee is proceeding according to the Type B rule. The Type B rule, promulgated August 1, 1986, sets forth the general administrative process for conducting all natural resource damage assessments and the various alternative methodologies that may be used in a Type B assessment. The rule provides the steps to be taken, the kinds of information to gather and consider, the points at which decisions are to be made, and the kinds of records and reports that are needed. The rule and the available technical documents establish the process, and give examples of what to look for and how to document it. They offer examples of criteria, but they do not prescribe the decisions.

After the preliminary determinations to do an assessment are made and documented, an assessment plan is required. Then, both the Type A and the Type B assessments require the same three steps: injury determination, quantification of the effects of the injury, and damage determination -- damages being the monetary compensation for the resource injury.

In the injury determination phase of a Type B assessment, trustee officials determine and document measurable adverse changes in their resource using their analyses of information gathered. Injury to surface water resources, for example, may be indicated by failure to meet existing EPA or State promulgated standards. Injury to biological resources may be indicated by an adverse change in viability, including not only death, but disease, behavioral abnormalities, or physical deformations among other categories.

In the quantification phase, the trustee officials identify the "services" provided by the resource, such as habitat, recreation, or erosion control. They determine the baseline, or pre-spill level of such services, and quantify the reduction in services resulting from the discharge or release.

In the damage determination phase, the focus is on economic valuation of the natural resource injuries. The trustee officials calculate the monetary compensation for the resource injuries determined and quantified in preceding phases, based on either the estimated costs to replace or restore the resource, or the loss in use value of the resource.

Following the assessment procedures are requirements for a Report of Assessment, establishment of an account for damage assessment awards, and development of a restoration plan -- by law, all damage assessment awards are to be used for the restoration or replacement of the injured resources.

We like to emphasize that the "bottom line" of these procedures is restoration of the injured resources.

The law confers upon the claim filed by a natural resource trustee using these rules the evidentiary status of a "rebuttable presumption." Therefore, the quality of information developed by the trustee is important, i.e., a natural resource damage assessment that is worthy of the benefits associated with the rebuttable presumption. The rule is intended to require a useful level of specific detail without removing the resource decisionmaker's flexibility or nullifying his best judgments.

It is important to note that the use of this regulation is optional, but a natural resource damage assessment performed by Federal or State trustees in accordance with the regulation is provided the legal evidentiary status of a rebuttable presumption in an administrative or judicial proceeding. Thus, trustees are at liberty to use some procedure other than the Interior-developed regulation. However, if they do, their claim will not have the benefit of the rebuttable presumption.

The law calls for a review of the rule every two years, allowing for revisions as necessary based on such considerations as experience in using the rule, or analysis of newly developed technologies. Last year, 1988, the Department announced its first biennial review of the Type B procedures which had been promulgated in 1986. Four comments were received and considered. Two comments said the rule had not been in place long enough for there to be a clear determination as to changes needed. The Department closed out the process by publishing a notice discussing the comments received, and announcing the decision not to revise the regulation at this time.

The Type A rule now covers only coastal and marine environments. We are already working on a second Type A rule which will cover the Great Lakes water-related environments in a similar fashion to that of the coastal and marine environments. We have published a notice seeking comments on the existing Type A model, especially comments derived from experience with use of the model, and inputs possible because of new technology, systems, or standards developed since the rules were first written.

The regulation offers a readily available set of common-sense steps -- based on "best available procedures" for gathering and considering the information necessary to develop an assessment of damages for presentation to the responsible party, in compensation for injured resources. The rule was developed drawing on a broad range of scientific and technical expertise, including consideration of existing State programs developed for similar purposes.

States are beginning to express greater and greater interest. Not all States have as yet made their state trustee designations (as called for in section 107 OF CERCLA). As of May 1989, the Governors of 40 States (or territories) have designated the agency or individual within the State to act as trustee(s) for natural resources for the purposes of CERCLA and the Clean Water Act, while there are still 16 States for which we know of no such designation.

It is too early to have a full record of achievement on the use of this rule. Our knowledge of experience to date in applications of the rule is anecdotal, and not definitive. There is no requirement to involve or notify Interior of cases where the rules are applied. However, our field offices offer a good window on available experience. Our Regional Environmental Officers (REOs) are the Department's members on the Regional

Response Teams, and as such they are usually the prime Interior point of contact for the on-scene coordinator's (OSC) notification of spills or releases, for subsequent involvement of Interior bureaus, and for coordination among Interior bureaus with other Federal agencies and States involved in a response action.

Natural resource trustee activities operate outside the aegis of the RRTs, but our REOs' responsibilities and knowledge in both areas gives us access to available case histories. At this point in time, the available information on use of the rule does not lend itself to statistical breakdowns and analysis. However, we have an interesting case history published by an official of the Fish and Wildlife Service on the damage assessment activities as a result of the major spill in the Savannah River in 1986. We were also involved in numerous and lengthy deliberations as to possible trustee actions as a result of the Ashland oil spill in January of 1988. And of course all previous experience is overshadowed by the ongoing experience with the Exxon Valdez spill in Prince William Sound.

In Alaska, Interior continues to provide technical support to the Coast Guard on-scene coordinator on response matters related to migratory waterfowl, raptors, sea otters, national park and monument lands and national wildlife refuge lands in several parts of the Maritime Refuge. In addition, Interior, coordinating and communicating through the RRT, is supervising efforts to protect and rehabilitate the wildlife under our jurisdiction. We plan to continue these activities in cooperation with the Coast Guard, NOAA, and Alaska Fish and Game authorities, even as we continue our efforts with the trustee group on the natural resource damage assessment.

Trustee activities are not included under the National Contingency Plan, which is addressed to response efforts (including remediation activities at hazardous waste sites as well as removal and other response activities associated with spill incidents). Trustees manage activities associated with the natural resources or lands they manage or protect, consulting and coordinating with other trustee agencies to guard against duplication or gaps in their efforts on behalf of shared or adjacent trust resources. Interior has an equal role with other trustees in the development of the natural resource damage assessment plan, and the subsequent implementation of that plan leading to the natural resource damage assessment.

In addition, since Interior was delegated the responsibility for writing the rule for the use of trustees in conducting natural resource damage assessments, a small cadre of Interior staff personnel have a continuing role in training resource managers and field staff in how to use the rules. Also, since the CERCLA authorizing legislation mandates a biennial review of the rule, this staff will be closely monitoring the effectiveness of the rule to the extent that it may be applied to this major spill. The rule is a compendium of "best available procedures" applicable to determining injuries to natural resources and determining compensation for those injuries or losses. However, it has not been tested by experience on a spill of this size.

In response to a letter of August 7, 1987 from this committee, we reported on our program for addressing hazardous waste sites under Superfund authorizations, by conducting Preliminary Natural Resource Surveys (PNRS). We have continued this effort, still undertaking approximately 250 PNRS a year, including both new assignments and followups to update our record on sites where new information is available, or where some time has elapsed between the original review and the EPA-proposed consent agreement with the responsible party.

We have an updated memorandum of agreement with the Environmental Protection Agency (EPA), to be implemented by Interagency agreements with each EPA region. These agreements are intended to allow us to have completed our PNRS, and to have the basis for a Department position on natural resources concerns at a site, by the time EPA is ready to negotiate or take other action at that site. This system has become more routine over time and thus is working better now than eighteen months ago when we responded to the Committee's initial request for a report. Our Regional Environmental Officers are working with EPA regional officials, especially site managers, to improve communications, starting with the timeliness of their notifications, our access to site information, and consideration of our concerns at appropriate intervals throughout their procedures. At some sites we are notified at the last minute. In other cases, we are given a list of sites as notification before EPA site activities are scheduled, or before site information is developed. Newly developed EPA guidance on environmental evaluations at sites will afford Interior and other trustee agencies timely opportunities to participate at early stages in EPA site evaluations and cleanup determinations.

At the present time, we may receive requests for agreement to a covenant not to sue from the Department of Justice (DOJ), or from EPA attorneys, site managers or other regional officials. Wherever the request comes from, we refer the requester to the PNRS process, and to the documents necessary for such an agreement -- a letter from Interior's Solicitor in response to a letter from the Department of Justice. Whenever the request comes, we schedule activities necessary to update our PNRS information if we've looked at the site before, or to conduct a PNRS if we have not. The major trustee bureau in the Department is the Fish and Wildlife Service, and they have the major burden, along with our REOs, of meeting these schedules. Our aim is to make these procedures as consistent as possible, so that lead time allows for more efficient work planning.

We are pleased with the number of sites at which our trustee concerns can be resolved by working with EPA and the responsible party on our specific concerns, such as monitoring streams for water quality parameters satisfactory to the fish and wildlife service, or including measures in the remedial action workplan to ensure that the construction or other cleanup activities do not themselves result in resource injuries. We continue to see these kinds of settlement opportunities as one of the strong points of our Superfund program.

We appreciate the interest of the Committee in our natural resource trustee activities.

TESTIMONY OF GORDON J. JOHNSON, ASSISTANT ATTORNEY GENERAL OF NEW YORK, ON BEHALF OF ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK, BEFORE THE SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT

Mr. Chairman. Thank you for the opportunity to appear on behalf of Robert Abrams, the Attorney General of New York, and give testimony concerning the successes of and deficiencies in the natural resource damages provisions of the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA, and Section 311 of the Clean Water Act. Attorney General Abrams, who was not able to attend today, asked me to convey his personal appreciation for this time to present our State's experience and views concerning these very important provisions of environmental law.

SUMMARY OF TESTIMONY

The natural resource damages provisions of CERCLA and §311 are extremely important to all states, not just New York. By allowing state trustees of natural resources to seek damages when these resources are degraded or destroyed, funds needed to restore or replace the injured resource can be obtained. With these provisions, states which do not have the funds to remedy a contaminated site first and then seek reimbursement through the response cost provisions of CERCLA or §311 can obtain cleanups otherwise impossible to accomplish because of the absence of funds. To assist in the recovery of these damages, Congress directed the President, who acted through the Department of the Interior, to promulgate regulations for the assessment of natural resource damages. Trustees' computations of damages under the rules would receive a rebuttable presumption in actions to collect the damages from "potentially responsible parties," or PRPs.

The promulgated rules, however, so severely limited the damages collectable that, to our knowledge, no state trustees have used the regulations in the almost three years since their promulgation. Generally, the damages are limited to amounts far below those needed to restore or replace damaged resources, and afford almost no recovery when "special resources" are damaged, that is, habitats or species restricted to one use and given special protection by other laws. Federal trustees, however, have generally insisted on following the regulations in those rare instances where a federal trustee has seen fit to become actively involved in natural resource damage assessments, creating serious difficulties for state trustees in their legal actions and even settlement negotiations with PRPs.

Finally, together with the National Association of Attorneys General (NAAG), of which Attorney General Abrams is President, we strongly urge the passage of amendments to CERCLA to permit the funding of natural resource damage assessments and enforcement through the "Superfund" established by CERCLA. Without a source of funds, many states cannot even begin to determine the extent of natural resource damages resulting from oil or chemical spills, much less begin the costly legal actions to collect those damages.

DETAILED COMMENTS

A. The Importance of the Natural Resource Damage Provisions to the States.

CERCLA provides states two mechanisms for the recovery of funds needed to cleanup chemical spills.[1] First, a state may spend money on site cleanups and then seek reimbursement for its response costs.[2] Unless a state has its own state "Superfund" and there are not too many sites in that state, the reimbursement option is not always available simply because the state does not have the funds or personnel to perform or supervise the cleanups.[3]

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[1] Provisions of §311 of the Clean Water Act are similar; references hereafter will only be to CERCLA.

[2] "Response costs" are state costs incurred when responding to and remedying a release of hazardous substances. CERCLA §101(25). These costs are either "removal" costs, incurred in connection with short-term or immediate measures addressing imminent endangerments to public health or the environment, or "remedial" costs, those incurred in connection with developing and implementing the long-term or permanent remedy. CERCLA §§101(23)-(24). Liability is imposed on specified persons responsible for the released hazardous substances, pursuant to CERCLA §107(a)(4)(A).

Another option for a state is to seek natural resource damages pursuant to CERCLA §107(a)(4)(C). Funds collected must be used to restore or replace the damaged natural resource, which necessarily includes cleanup of the chemical spill in order to stop the continuing contamination of the resource. CERCLA §107(f)(1). In fact, the scope of damages addressable in this manner is often broader than those traditionally addressed by EPA's removal or remedial programs. In many cases where rivers or lakes are contaminated by leaching chemicals from adjacent shoreline sites, the site cleanups sometimes do not go beyond the source of the contamination, i.e., the contaminated soil at the site of the release or groundwater plume extending from it. In contrast, natural resource damages are recoverable, for instance, in order to replace killed or contaminated wildlife and fish, or to clean chemically-contaminated sediments down-river well beyond the site boundaries. Trustees can also collect damages for lost uses of a resource pending its restoration and cleanup of the release.

The natural resource damages provisions are the embodiment of recognition that the effects of chemical releases do not cease at the boundaries of the contaminated sites. For instance, New York's striped bass fishery off the coasts of Long Island was destroyed by General Electric's discharge of PCBs into the Hudson River near Fort Edwards, hundreds of miles away. PCB-contamination of fish persists even though GE's active discharges ceased in the 1970s. Furthermore, even the best cleanups cannot restore irremediably damaged resources. A heavily contaminated aquifer cannot always be cleaned, and dead fish do not come back to life. The damages cause of action give states a source of funds to replace or acquire the equivalent of these irremediably damaged resources and to compensate for the uses of the resources lost until the resource is restored or replaced, unobtainable in many situations through the response cost provisions.

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[3] Some sites may be listed on the federal National Priorities List (NPL), CERCLA §105(a)(8)(B), and thus be eligible for federal cleanup. However, even then the state must pay at least 10% of the remedial costs, a considerable burden in some states. Then the cleanup is conducted primarily by EPA, a process which historically has been slow and expensive.

As Congress found after hearings in 1979, it can be difficult to recover such damages under common law or pursuant to state laws. While to some extent state laws have improved since then, CERCLA and §311 remain major vehicles for the recovery of natural resource damages for states. Natural resource damage assessment procedures, promulgated pursuant to CERCLA §301(c), were envisioned by Congress to be an essential tool in the process by simplifying a trustee's court case. Assessments performed by a federal or state trustee are entitled to a rebuttable presumption in court actions seeking such damages, CERCLA §107(f)(2)(C), and thus can also be powerful inducements to PRPs to settle with trustees before trial.

B. The Inadequacies of the Regulations.

While Congress intended that, at a minimum, sufficient funds be collected to restore or replace the damaged resources,[4] the regulations promulgated by the Department of Interior (DOI) provided otherwise. Instead, the measure of damages was defined as the lesser of the cost of restoration or diminution in "use values" of the resource. See, 43 C.F.R. §11.35(b)(2).[5] In most cases, the sums collectable under the regulations will be vastly insufficient to restore or replace damaged natural resources. As Attorney General Abrams, several other states and environmental groups wrote to Interior Secretary Lujan On April 26, 1989, the regulations conflict with President Bush's policy statements that, as in the case of Alaska's Prince William Sound, the United States intends that Exxon restore the Sound's ecology, not simply pay limited damages for the destruction wrought by the oil spill there.[6]

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[4] "Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) [natural resource damages liability provision] shall not be limited by the sums which can be used to restore or replace such resources." CERCLA §107(f)(1).

[5] The promulgated regulations are codified at 43 C.F.R. Part 11 (1988). "Use values" are defined as "the value to the public of recreational or other public uses of the resource, as measured by changes in consumer surplus, any fees or other payments collectable by the government for a private party's use of the

For instance, the DOI regulations compute the "use value" of a seal as $15, the value of a seal pelt, and thus the maximum recovery of a trustee for each injured or dead seal is but $15. 52 Fed.Reg. 9043 (March 20, 1987). However, the actual cost of returning seals to their habitats after the cleanup of a spill, together with the restoration of that habitat, is well above that figure. Cleaning contaminated seals in Alaska costs more than just $15, and the cost of returning young seals or restoring damaged rookeries certainly is far above that figure.

Numerous other restrictions in the regulations concerning how to compute damages reduce the recovery of a trustee. One, when evaluating what uses of a resource have been reduced or lost because of a spill, only current uses and those uses to which the natural resource has been "committed" by statute or administrative action can be considered. 43 C.F.R. §11.84(b)(2). Thus, resources which are still unused and remain in their pristine state may, if damaged, have no value under the

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natural resource, and any economic rent accruing to a private party because the government does not charge a fee or price for the use of the resource." 43 C.F.R. §11.83(b)(1).

[6] A copy of the letter, sent April 26, 1989, from the Attorneys General of New York, Rhode Island, Connecticut, Texas, Ohio, Maine and Colorado, and the environmental groups National Wildlife Federation and Public Citizen, Inc., is attached. The Attorneys General of Massachusetts and California also wrote, similarly addressing the conflict between the President's words and the regulations' provisions. See, letter dated May 10, 1989, attached.

regulations because they have no current or committed uses. Second, as if the "lesser than" rule was not enough to limit recovery of damages, trustees must accept the market value of a resource when computing damages, even if that price does not reflect the full value to society of the resource. Again, seals only are worth $15 apiece, even though they have greater value to Inuit as a food source or to tourists viewing seal colonies on the Alaskan coast. Third, trustees can only collect damages for resources which are publicly-owned under the rules, even though the public has rights in privately-owned resources, such as fishing and navigation rights, that date from colonial times.[7] There are other problems as well.[8]

When initially proposed, the regulations contained a limited exception to the "lesser than" rule, applicable in the case of "special resources." These were defined as resources granted explicit protection by law and restriction to one use.[9] DOI conceded that the legislative protection was a recognition that the resource's apparent "use value" was low but that the resource nevertheless deserved protection. Consequently, the proposed rule excepted special resources from the "lesser than" rule when computing damages for injuries to such resources. 50 Fed.Reg. 52141 (Dec. 20, 1985). However, DOI's final rules eliminated the concept of special resources and their exception from the "lesser than" rule. The net result is that many endangered species or their habitats can be damaged without redress under the regulations because the damages collectable are computed under the regulations as only the lost use values, conceded to be a very small value.[10]

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[7] See, Phillips Petroleum Co. v. Mississippi, ___ U.S. ___, 108 S.Ct. 7791, 799 n.12 (1988), where the Supreme Court noted that even when tidelands are privately-owned, the public has rights of fishing, hunting, bathing, etc.

[8] See, the joint briefs of the petitioning States of New York, Ohio, Colorado, Massachusetts, California, Maine, New Jersey, Connecticut, Rhode Island and Vermont, and the environmental groups National Wildlife Federation, Public Citizen, Inc., and Environmental Defense Fund, filed in the challenges to the Department of the Interior's regulations. These cases are consolidated under the title State of Ohio v. Department of the Interior, et al., No. 86-1529 and consolidated cases (D.C. Cir.), and State of Colorado v. Department of the Interior, et al., No. 87-1265 and consolidated cases (D.C. Cir.). The cases were argued February 22, 1989.

[9] The proposed regulation defined "special resources" as "those natural resources that have been set aside and committed to a specific use by law before the discharge of oil or release of a hazardous substance was detected. The term includes resources that were set aside primarily to preserve wildlife habitat or other unique and sensitive environments. It does not include resources that have been set aside but are committed to multiple-use management, nor does it include resources listed on administratively determined lists for special protection, or

Moreover, the regulations themselves are often in direct conflict with state laws. Numerous states have adopted statutes which expressly provide that the measure of damages to natural resources is the cost of restoring the affected resource. See, 10 Ecology L. Rev. 5, 19 (1982). Rather than an effective tool, the regulations have had the opposite result intended: they limit, rather than expand the scope of damages a natural resource trustee can collect, and lead to conflicts between state and federal trustees.

C. Relations Between the State and Federal Trustees.

Because of the inadequacies of the regulations, no state trustee has used the regulations voluntarily to assess natural resource damages. However, the states' refusals to use the

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resources protected by regulatory statutes." 50 Fed.Reg. 52150 (Dec. 20, 1985). This definition still severely limited the type of resources included because of its exclusions, but was at least a first step in dealing with the problem created by adoption of the "lesser than" measure of damages by DOI.

[10] For instance, wetlands that are protected from development often have low market values, yet are the habitat for many plants and animals, provide flood control, allow for clean groundwater recharge, and serve other important ecological functions. Under the regulations, the damages for a spill which destroys wetlands often will be only the wetlands' low market value instead of the cost of restoring these essential habitats.

regulations has not meant that they can ignore them. In many situations natural resources affected by a chemical release are subject to overlapping state and federal trusteeships. Consequently, because federal trustees of natural resources almost always have refused to abandon the prescribed methodologies and procedures of the regulations, the regulations have remained an issue between the trustees and PRPs.

The regulations provide that whenever there are multiple trustees, the federal trustee will act as the lead trustee if agreement cannot be reached among all trustees. 43 C.F.R. 11.32(a)(1)(ii)(B). Because federal trustees are wedded to the regulations, and state trustees are firmly opposed, PRPs have had the opportunity to exploit this difference in negotiations about both the nature of the natural resource damage assessment to be performed and settlement of the claims themselves. For instance, PRPs have agreed to only perform an assessment which is in accordance with the regulations, leaving the state trustee with limited options when the federal trustee agrees. Because of the way key decisions are made and terms defined by the rules, substantial elements of a state trustee's claims will not be assessed when this occurs. And, because the state trustee often lacks funds to perform the assessment itself and thus may be in a weakened negotiating position, the PRP is under no compulsion to perform or fund a state assessment. Thus, while CERCLA in theory encourages cooperation between the federal and state trustees, the reality has proved to be different.

At the few sites where a federal natural resource trustee has become involved in New York and elsewhere, PRPs have sensed the conflict between the federal trustee and the state and have attempted to exploit it. However, perhaps more disheartening has been the absolute absence of a federal trustee from proceedings and investigations, particularly in those states which lack programs and funding to enforce the damage provisions. Rarely have federal trustees even expressed an interest in natural resource damage, coming into situations only when compelled to because of a PRP request for a release from liability. While the usual response has been to deny the request for a release from liability, at least pending a "preliminary natural resource assessment," the federal trustees rarely have pursued their claims any further. The federal agencies have explained to my office that they lack funds to conduct assessments or institute litigation to recover damages themselves, and that the best they can do is to try to encourage a better remediation of the site.

D. Assessments and the RI/FS Process.

Section 104(b)(2) requires EPA to notify natural resource trustees of potential damages and "seek to coordinate the assessments, investigations, and planning . . . with such Federal and State trustees." While particularly in the last two years EPA's performance in the Superfund program has improved, EPA still has shown little interest in assessing natural resource damages. EPA views its primary obligation as remedying the chemical release by elimination of the chemical from the site through treatment or other measures or the chemical's demobilization or containment. The chemical release's effect on biota is not EPA's immediate concern unless the release still is threatening uncontaminated wildlife or humans. Damages resulting from that past exposure are not within EPA's bailiwick. Thus, natural resource damage assessments are of secondary importance, if any importance at all, to EPA. Since EPA is the driving force at NPL sites, its lack of concern has translated into little pressure on PRPs to fund damage assessments, and serious reluctance on the part of EPA to expand its normal "remedial investigation and feasibility study" (RI/FS) to include natural resource injury determinations.

E. Superfund Funding of Damage Assessments and Enforcement.

Unless state, and even federal trustees have the funds to perform natural resource damage assessments themselves, assessments will not occur. Assessments are not cheap. Even in 1979, when Congress first heard testimony on their costs, complex assessments were estimated to cost at least $250,000. DOI's "type B" regulations do not lessen that cost.[11] Trustees essentially have been left to rely on the generosity of PRPs or the limited availability of state funds. CERCLA authorizes the use of Superfund moneys to pay for natural resource damage assessments and enforcement. CERCLA §§111(c)(1)-(2). However, the revisions to the Internal Revenue Code, which were made in the Superfund Amendments and Reauthorization Act of 1986 (SARA), forbid the expenditure of Superfund moneys for these purposes. SARA §517(a), adding IRS Code §9507(c)(1)(A). Unless an assessment can be performed or enforcement actions initiated, there is no reason for a PRP to fear litigation seeking such damages.

Attached are resolutions of the Association of Attorneys General (NAAG) which detail the need for legislative action restoring funding for natural resource damages assessments and enforcement, adopted at NAAG's Spring Meeting of March 8-10, 1987 and at its Summer Meeting of June 8-11, 1987.

CONCLUSION

The issues raised in this hearing are important and timely. We ask that prompt consideration be given to legislation to fund natural resource damage assessments and enforcement. In addition, we suggest that the House of Representatives continue to examine the deficiencies of the Department of Interior's natural resource damage assessment regulations. In particular, we urge that appropriate actions be taken reaffirming Congress's words and intent that those regulations provide that the cost of restoration of damaged natural resources, plus the value of lost uses and other damage pending restoration, be the minimum measure of damages when natural resources are injured.

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[11] In fact, the type B regulations require trustees to engage in inordinately expensive scientific research to validate findings of scientific injury, and remarkably provide that such costs may not be recoverable in a damage action. See, 51 Fed.Reg. 27710 (Aug. 1, 1986).

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
JOHN W. McCORMACK STATE OFFICE BUILDING
ONE ASHBURTON PLACE, BOSTON 02108-1698

JAMES M. SHANNON
ATTORNEY GENERAL

May 10, 1989

The Honorable Manuel Lujan
Secretary of the Interior
c/o Office of the Solicitor
Department of the Interior
Washington, D.C. 20240

Dear Secretary Lujan:

In light of the catastrophic oil spill in Prince William Sound, Alaska, we urge you to reconsider and revise the deficient and restrictive rules that have been issued by the Department of the Interior for the recovery of natural resources damages caused by oil spills and other hazardous substances. President Bush has publicly stated that the government's objective with respect to the Exxon spill is "complete restoration of the ecology and economy of Prince William Sound," and that Exxon Corporation will be liable for the amount needed to accomplish such restoration. Washington Post, p. A4 (April 8, 1989). Likewise, you have recently been quoted as stating that "[o]ur [the federal government's] role is to try to put it [the Alaskan environment] back as it was." Washington Post, p. A12 (April 21, 1989).

However, under the Interior Department's recently-issued rules, state and federal trustees of natural resources who use the rules are entitled to recover only a small fraction of the amount that actually will be needed to restore or replace damaged natural resources. Hence, if the Department's current rules are used to assess the injury and economic damage caused by the Alaska oil spill, President Bush's stated policy of forcing Exxon to pay the full costs of restoration will not be fulfilled.

As you know, under the provisions of both the Comprehensive Environmental Response, Compensation and Liability Act, as amended in 1986, and the Clean Water Act, the Department must issue rules that can be used by the states to recover natural resources damages. Congress' objective in creating this requirement was precisely the same as that articulated by President Bush with respect to the Exxon disaster -- to ensure that the polluter pays for the "complete restoration" of valuable natural resources that have been devastated or destroyed by oil or other hazardous wastes.

Unfortunately, largely at the urging of oil companies and chemical manufacturers -- including Exxon -- the Department's rules, which were issued in 1986 after years of delay and a court order compelling the Department to act, do not enable state and federal trustees using the rules to recover the funds needed for full restoration, or anywhere near that amount. Instead, the rules generally restrict trustees to recovering the "market values" of resources that have been damaged or destroyed. Employing this approach, for example, fur seals killed by the Exxon oil spill would be valued at only $15.00 apiece because that is the market price of a fur seal pelt.

Likewise, under the Department's rules, the birds, otters, and other wildlife devastated by the spill would also be valued at absurdly low levels, and certainly nothing close to the amount needed to fully restore the ecologically-rich Prince William Sound. Indeed, the extreme undervaluation of resources would even apply to endangered or threatened species, since the Department refused to adopt any special damage assessment procedures for these federally-protected resources.

The Department's rules create a myriad of other economic, scientific, and administrative obstacles to the recovery of funds needed to restore damaged resources. It is not surprising, therefore, that not a single state has employed the rules to recover a penny in natural resources damages, let alone used any recovered funds actually to restore damaged resources. Simply stated, the rules accomplish precisely the opposite of Congress' intent -- they deter, rather than facilitate, the restoration and recovery of injured natural resources, such as those still reeling under the assault of the Exxon oil spill. Regrettably, these are the rules that will apparently be used by federal trustees when they undertake to assess the damages to natural resources caused by the Alaska oil spill.

Because of the glaring deficiencies in the Department's rules, ten states and three environmental organizations have been pursuing litigation in the United States Court of Appeals for the District of Columbia Circuit to have the rules overturned. These cases, which are captioned *State of Ohio v. Dep't of Interior*, No. 86-1529, and *State of Colorado v. Dep't of Interior*, No. 87-1265, were argued on February 22, 1989. However, the Department need not and should not await the outcome of this litigation in order to announce that it is undertaking its own review of the adequacy of its natural resources damages rules in light of the fact that President Bush's declaration of policy regarding the largest oil spill in United States history is flatly contrary to the Department's rules.

In sum, the Alaska oil spill affords a tragic but appropriate opportunity for the Department to reconsider its natural resources damages rules and issue new rules that will allow states to recover from polluters the funds needed to completely restore injured resources. Only then would President Bush's stated goal -- "complete restoration of the ecology and economy" -- become a reality for precious natural resources that have been degraded by oil spills and other hazardous substances.

Sincerely,

JAMES M. SHANNON
Attorney General of the
Commonwealth of Massachusetts

Department of the
Attorney General
John W. McCormack State Office
Building
One Ashburton Place
Boston, MA 02108-1698

JOHN K. VAN DE KAMP
Attorney General of the
State of California

California Attorney General
3580 Wilshire Boulevard, Room 800
Los Angeles, California 90010

cc: President George Bush
Lawrence E. Blatnik
Margaret Kane Harrington

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Spring Meeting
March 8-10, 1987
Washington, DC

RESOLUTION

VI.

NATIONAL RESOURCE DAMAGE ASSESSMENTS

WHEREAS, the position of the National Association of Attorneys General and the National Governors' Association, as presented to the United States Congress during its deliberations on the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499 (Oct. 17, 1986), was that it is appropriate that the federal Hazardous Substance Superfund be a source of last resort for satisfaction of a state's claims for damages to its natural resources caused by hazardous substances which have been released into the environment so long as the federal Superfund remained available in the first instance for satisfaction of state claims for natural resource damage assessment costs; and

WHEREAS, the United States Congress accepted this position by amending section 111(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") (commonly known as the "Superfund Act"), 42 U.S.C. sec. 9611 (b)(2) (amended 1986), to provide that the Superfund is not available for payment of "natural resource claims" until the claimant (which would include a state) has exhausted all administrative and judicial remedies to recover the claim from liable parties, but which amendment also specifically provides that the phrase "natural resource claims" does not include "any claim for the costs of natural resource damage assessment," 42 U.S.C. sec. 9611 (b)(2)(B) (amended 1986), thus assuring that the Superfund is available in the first instance to pay state natural resource damage assessment claims; and

WHEREAS, as evidence of its intent that the Superfund be available to pay state natural resource damage assessment claims, the United States Congress amended CERCLA section 111(c) by SARA section 111(d), to provide:

> (c) Uses of the fund ... include
>
> (1) The costs of assessing both short-term and long-term injury to, destruction of, or loss of any natural resources resulting from a release of a hazardous substance.

42 U.S.C. sec. 9611(c)(1) (amended 1986) (emphasis added); and

WHEREAS, the United States Congress, in further evidence of its intent that the Superfund be available to pay state natural resource damage assessment claims, amended section 221(c) of CERCLA, 42 U.S.C. sec. 9631(c) (amended 1986), by section 204(b) of SARA, to read as follows:

> (c) *Expenditures from trust fund.* Amounts in the Hazardous Substance Superfund established under Subchapter A of chapter 98 of the Internal Revenue Code of 1954 shall be available for expenditure only as provided in section 9611 of this title

and, as quoted above, CERCLA section 111(c)(1), 42 U.S.C. 9611(c), expressly authorizes use of the Superfund for natural resource damage assessment claims; and

WHEREAS, late in the legislative session, following committee approval of the above-quoted provisions of SARA, there was inserted into section 517(a) of SARA, which did *not* amend CERCLA but which amended section 9507 of subchapter A of chapter 98 of the Internal Revenue code of 1986, the following language:

> (c) *Expenditures From Superfund.*
>
> (1) *In General*. Amounts in the Superfund shall be available, as provided in appropriation Acts, only for purposes of making expenditures --
>
> (A) to carry out the purposes of --
>
> ...
>
> (ii) section 111(c) of CERCLA (as so in effect), *other than paragraphs (1) and (2) thereof*, ...

(Emphasis added) which, by purportedly rejecting the availability of the Superfund for purposes specified in CERCLA section 111(c)(1), purports to make the Superfund unavailable to pay state natural resource damage assessment claims; and

WHEREAS, the above-quoted provision of SARA section 517(a) expressly contradicts the provisions of the more directly applicable and governing sections 111(d) and 204(b) of SARA, both of which amended the express provisions of CERCLA which govern use of the Superfund and which expressly make the Superfund available to support state natural resource damage assessment activities; and

WHEREAS, the availability of the Superfund to support state natural resource damage assessments assures that states will have the necessary financial resources to undertake the often complex highly technical, and very expensive environmental investigations which are necessary to properly assess natural resource damages caused by released hazardous substances; and

WHEREAS, making the Superfund available to support state natural resource damage assessment activities is in the public interest because the evidence gained from environmental investigations designed to assess natural resource damages caused by released hazardous substances will also be used by the states to support enforcement actions against responsible parties under applicable federal and state environmental laws, which enforcement actions will secure both site clean-up and the restoration, rehabilitation or replacement of damaged natural resources; and

WHEREAS, the United States Congress has already made available to the states in section 107(a)(1)-(4)(C) of CERCLA, 42 U.S.C. sec. 9607(a)(1)-(4)(C) (amended 1986), a federal cause of action for recovery of natural resource damages and damage assessment costs from responsible parties; and

WHEREAS, the necessary replenishment of the Superfund can be assured by contractual arrangements between a state and the United States Environmental Protection Agency whereby the state would commit itself to seeking recovery from responsible parties and subsequent reimbursement to the Superfund of any natural resources damage assessment monies advanced to the state by the Superfund.

NOW, THEREFORE, BE IT RESOLVED BY THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL that the Administrator of the United States Environmental Protection Agency ("USEPA") should be, and hereby is, urged to promptly resolve the conflict between SARA sections 111(d) and 204(b) on the one hand and SARA section 517 on the other hand by promulgating, by formal rulemaking or otherwise, a policy that assures that the Superfund will be available to states to support their natural resource damage assessment activities and which, while securing state fiscal accountability, will minimize unnecessary administrative restrictions and impediments on the state's assessment activities.

BE IT FURTHER RESOLVED BY THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL that its representatives to the U.S. Department of Justice National Environmental Enforcement Council and USEPA Advisory Committee now advising the USEPA on the revised administrative rulemaking required by SARA be directed to advance, explain and support the position taken by this Resolution and that the Executive Director of the Association be directed to call upon the environmental staff attorneys and such other members of the Association as she may deem necessary to advise and support the activities of such Association representatives.

BE IT ALSO FURTHER RESOLVED BY THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL that, should reasonable efforts to secure the benefits of this resolution from the Administrator of USEPA prove unsuccessful, the United States Congress should be, and hereby is, urged to promptly amend section 517 (a) of SARA by deleting the phrase "other than paragraphs (1) and (2) thereof" from section 9507 (c)(1)(A)(ii) of subchapter A of chapter 98 of the Internal Revenue Code of 1986.

BE IT FURTHER RESOLVED that this resolution be referred to the legislative subcommittee of the Environment Committee for further action.

IT IS SO RESOLVED.

THE HONORABLE STEVE CLARK
Attorney General of Arkansas

President,
National Association of
Attorneys General

CERTIFICATION

I hereby certify the foregoing Resolution was duly adopted by majority vote of the members of the National Association of Attorneys General present at a duly called meeting of the membership held on the 10th day of March, 1987, at which a quorum was present.

CHRISTINE T. MILLIKEN, ESQ.
Executive Director
National Association of
Attorneys General

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Summer Meeting
June 8-11, 1987
Coeur d'Alene, Idaho

V

RESOLUTION

AVAILABILITY OF SUPERFUND MONIES FOR ENFORCEMENT OF NATURAL RESOURCE DAMAGE PROVISIONS

WHEREAS, the protection of state and territorial natural resources from injury, destruction, or loss is of vital interest to all states and territories; and

WHEREAS, section 107 of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499 (Oct. 17, 1986), is a powerful enforcement authority for states to compel responsible parties to clean up abandoned hazardous waste sites and satisfy state claims for damages to natural resources; and

WHEREAS, funding for governmental enforcement of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA, commonly known as Superfund), 42 U.S.C. Sec. 9601 et seq., is limited by CERCLA Sec. 111(a)(1) to "governmental response costs incurred pursuant to section 104. . ." ; and

WHEREAS, under SARA the definition of "response" in CERCLA Sec. 101(25) was clarified to make clear that it includes removal and remedial actions as well as "enforcement activities related thereto"; and

WHEREAS, under said clarification Superfund monies are available to fund both federal and state enforcement actions to compel responsible parties to perform hazardous waste site cleanups;

WHEREAS, under SARA Congress also amended CERCLA to require the appointment of federal and state trustees to act on behalf of the public as trustees for natural resources (CERCLA Sec. 107(f)(2)) and to recover for damages to such resources (CERCLA Sec. 107(a)(4)(C), 107(f)(1)); and

WHEREAS, Congress has specified that any recoveries by federal or state trustees for natural resources damages are available for use "only to restore, replace, or acquire the equivalent of such natural resources" (CERCLA Sec.107(f)(1)), and not to reimburse enforcement expenses required to recover such damages; and

WHEREAS, no provision currently exists in CERCLA for making Superfund monies available for the expenses of federal and state trustees in bringing natural resource damage claims under CERCLA Sec. 107(a)(4)(C); and

WHEREAS, natural resource damages frequently constitute a substantial component of the entire claim, above and beyond the cost of the actual site cleanup; and

WHEREAS, expenses by federal and state trustees to enforce the natural resource damages provisions of CERCLA, like other enforcement expenses of CERCLA, should be made an authorized use of Superfund;

NOW, THEREFORE, BE IT RESOLVED by the National Association of Attorneys General that the Administrator of the United States Environmental Protection Agency (USEPA) is urged formally to adopt a policy that assures that Superfund monies will be used to fund federal and state enforcement actions to satisfy natural resource damage claims, provided that federal and state trustees agree to reimburse the Superfund for monies successfully recovered for such enforcement costs;

NOW, THEREFORE, BE IT FURTHER RESOLVED by the National Association of Attorneys General that, should efforts to secure a resolution of this problem by action of the Administrator of USEPA prove unsuccessful, the United States Congress should be, and hereby is, urged promptly to amend section 111(c)(1) of CERCLA to read as follows:

> "The costs of assessing both short-term and long- term injury to, destruction of, or loss of any natural resources resulting from a release of a hazardous substance *and of enforcing a claim to recover for such injury, destruction, or loss;*" (New language italicized)

NOW, THEREFORE, BE IT FURTHER RESOLVED by the National Association of Attorneys General that the Executive Director is hereby authorized to transmit a copy of this resolution to USEPA Administrator Lee Thomas and to appropriate members of his staff; to Attorney General Edwin Meese, III, and to appropriate members of his staff; to interested members of Congress; and to other associations and environmental organizations.

Working for the Nature of Tomorrow®
NATIONAL WILDLIFE FEDERATION
1400 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

STATEMENT OF ERIK D. OLSON
COUNSEL, ENVIRONMENTAL QUALITY DIVISION
NATIONAL WILDLIFE FEDERATION

ON BEHALF OF THE NATIONAL WILDLIFE FEDERATION,
NATURAL RESOURCES DEFENSE COUNCIL,
NATIONAL AUDUBON SOCIETY,
ENVIRONMENTAL DEFENSE FUND,
PUBLIC CITIZEN,
ENVIRONMENTAL POLICY INSTITUTE,
OCEANIC SOCIETY, AND FRIENDS OF THE EARTH

BEFORE THE SUBCOMMITTEE
ON FISHERIES AND WILDLIFE CONSERVATION
AND THE ENVIRONMENT

OF THE
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
UNITED STATES HOUSE OF REPRESENTATIVES

MAY 25, 1989

Good morning Mr. Chairman and members of the Subcommittee, I am Erik D. Olson, Counsel for the National Wildlife Federation's Environmental Quality Division. The National Wildlife Federation ("NWF" or "the Federation") is the nation's largest citizen conservation organization, with over 5.8 million members and supporters nationwide, and with affiliated organizations in each state and in most U.S. territories. I also am appearing this morning on behalf of the Natural Resources Defense Council, National Audubon Society, Environmental Defense Fund, Public Citizen, Environmental Policy Institute, Oceanic Society, and Friends of the Earth. We appreciate this opportunity to testify today on the important natural resource damage program under the federal Superfund law and the Clean Water Act.

SUMMARY

The environmental community has advocated the enactment of the natural resource damage program, and has closely followed its implementation. On several occasions the Federation and certain other groups have had to resort to the courts to force an often reluctant federal government to fulfill its statutory duties under the program.

As we discuss this morning the complex economic, regulatory, scientific, and legal questions raised by the natural resource damage program, it is easy to lose sight of the concept's profundity. Congress has stated in clarion terms that government officials are to serve as legal guardians for fish, wildlife, and pristine ecosystems, recognizing that they cannot speak for themselves when destroyed by man's oil spills and toxic waste. When we view the gripping photographs of some of the more than 700 oil-soaked dead sea otters, tens of thousands of lifeless sea birds, and dozens of bald eagles killed by the Exxon Valdez spill in Alaska, the importance of these legal provisions is lost on few Americans.

Under Superfund and section 311 of the Clean Water Act, authorized representatives of the state and federal governments, and Indian Tribal authorities, are named "trustees" for the resources. The trustees are to sue polluters to recover damages for natural resources lost or injured by oil spills and hazardous waste. In addition, Superfund requires regulations to be developed to ease the trustees' burden in assessing the value of injured or destroyed resources.

We are here today to discuss how these far-sighted legal provisions work in practice. Regrettably, we must report that with precious few exceptions, they have been doing little more than gathering dust. Few natural resource damage assessments have been done, and even fewer damage claims have been collected. The fundamental reasons for this can be summarized in four basic points:

1. Lack of Assessment Money. Section 517 of the 1986 Superfund Amendments and Reauthorization Act (SARA) cut off the availability of damage assessment funds from Superfund, and no money is being made available from the Clean Water Act § 311(k) fund or other sources. Therefore, in virtually all cases trustees cannot competently assess the degree to which natural resources have been harmed by oil or toxics, so they have inadequate information to file or even to negotiate strong claims against polluters. As a result, the trustees often decide not to prosecute claims, or they sign covenants not to sue polluters, based on paltry or virtually nonexistent knowledge of the degree of damage done to natural resources at a site. At many sites with obvious damage to natural resources, no claims have been made due to lack of resources to conduct an assessment. This lack of money also can lead to a subtle "blackmail" problem: the responsible party, aware that the trustee lacks adequate funds to do an assessment, can strong arm from the trustees an agreement to do only a very limited damage assessment, or can negotiate minimal damages, because of the trustee's weak factual record and resulting poor negotiating position. In the case of the recent Alaska spill, the trustees have had to rely on Exxon to pay $15 million for the assessment. Because Exxon is paying, it likely will argue that it should have a lot to say about how the damages are calculated.

2. Interior's Rules. The Interior Department's damage assessment rules--which Congress intended to simplify and streamline trustee claims--so undervalue resources and so complicate recovery that to our knowledge they have never been used to file a claim, and they have discouraged trustees from bringing claims. This is why NWF, EDF, Public Citizen, and ten states challenged those rules in court; the decision is pending.

3. Interior's Apathy. The management of the Department of the Interior, and that of most other federal trustees, has demonstrated remarkable apathy towards the program, giving it little or no budget or management priority. Similarly, in large part due to the vacuum in federal interest and leadership, only a handful of states have vigorously pursued their own natural resource damage claims.

4. EPA's and DOJ's Insouciance. The Environmental Protection Agency, and the Department of Justice which in Superfund cases seems to view EPA as its primary client, traditionally have given little attention to natural resource damage issues. They often seem to regard natural resource damages as an after-thought, a troublesome stumbling block that can complicate their cleanup negotiations, or as a bargaining chip, rather than as an opportunity to insure that there is full restoration of the injured ecosystem.

The shocking lack of progress in this program is especially troubling because the statute of limitations in Superfund for filing natural resource damage claims--which Congress extended in the 1986 Superfund Amendments and Reauthorization Act in part because of poor government performance in assessing and claiming damages--now is rapidly approaching. If damages are not assessed at thousands of sites nationwide before the statute of limitations runs out, these claims may be forever lost. Just a small investment in an assessment at many sites would yield a many-fold larger damage recovery, but trustees do not have the money to do the assessments. For example, at the National Oceanic and Atmospheric Administration's top priority pollution site off the coast of Los Angeles, an assessment costing just one to two million dollars would allow NOAA to file what is estimated to be up to an $80 million claim. But NOAA lacks the assessment money to develop the claim, and may lose the claim because the statute of limitations is fast approaching.

If the present course continues, claims against polluters across the country will be lost, and the taxpayer likely will be asked to foot the bill for the restoration of natural resources at hundreds of pollution sites. This is exactly the result Congress sought to avoid in adopting Superfund's "polluter pays principle."

To begin to get this program on its feet, we recommend that Congress take the following actions:

1. Amend Superfund to allow it to be tapped for assessment costs. The Fund also should be available, subject to the existing strict limitations in CERCLA sections 111-112, for payment of damages at orphan sites. However, payment of assessment costs is clearly of the highest priority, so claims against polluters are not inappropriately settled, or completely lost due to lack of information or because the statute of limitations' deadline expires.
2. Adopt comprehensive oil spill legislation swiftly that, among other things: (a) provides trustees with "up front" money to conduct assessments of natural resource damages; (b) defines natural resource damages broadly and makes it crystal clear that restoration costs as well as lost use values are recoverable from the spiller; and, (c) assures that natural resource damage assessments are done swiftly, using a mechanism similar to that called for in Rep. Peter Smith's bill, H.R. 2223.
3. Immediately request an in-depth General Accounting Office audit of the natural resource damage program.

In the attached detailed statement, we discuss in greater detail the experience of the natural resource damage program, how state and federal coordination has worked, the problems with Interior's rules, and give more detailed recommendations for Congressional action.

DETAILED WRITTEN STATEMENT

EXPERIENCE WITH THE NATURAL RESOURCE DAMAGE PROGRAM

Because Congress stopped the availability of Superfund to pay for natural resource damage assessments, and since funding for assessments usually has not been requested or appropriated, state and federal trustees have had to pay for any assessments they do by "reprogramming" their existing efforts. In effect, this has meant that they do these natural resource damage surveys--if at all--in a "quick and dirty" fashion with little information and with few if any resources, time, or management support. These surveys usually are assigned on top of other ongoing duties of federal agency staff already over-committed on other projects.

Interior Department Damage Assessment Activities.

The Department of the Interior has the most federal land and other resources, and would, therefore, appear to have the largest trust responsibility. Interior reported to this Subcommittee that as of January, 1988, it had conducted 400 "Preliminary Natural Resource Surveys" or "PNRSs."[1] In 165 of these cases,

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1. Letter to the Honorable Gerry E. Studds from Interior Secretary Donald Paul Hodel, dated January 29, 1988. Enclosure I at 1.

Interior thought its resources were or might be at stake, and that damages were possible.[2] Yet as a result of those 400 PNRSs, Interior said it had never initiated a damage assessment.[3] In addition, Interior said it had issued 31 releases from liability to responsible parties, in some cases "granted with conditions," such as a requirement that the cleanup go forward as planned by EPA.[4] These releases from liability, and Interior's failure to conduct any damage assessments, tell only a small part of the story.

In fact, Interior admits that these PNRSs are merely "desk-top review of the information available" and that "a site visit of the nature of a 'windshield view or a perimeter walk is permissible but not required, and no sampling or independent study is contemplated."[5] One knowledgeable Interior Department official who has been involved in the PNRS process reports that they often are completed "with a few phone calls." With reportedly less than $2,000 spent on most sites, these PNRSs could hardly be much more than a scratch of the surface. Indeed, Interior's PNRSs often do not even appear to comply with the Department's own regulations for conducting a "preassessment

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2. Ibid.
3. Ibid.
4. Ibid at 4.
5. Ibid, enclosure II at 3.

screen," see 43 C.F.R. §§ 11.20 through 11.25, which requires development and review of more detailed information to inform the decision as to whether to proceed with an assessment.

In other words, Interior is making decisions about whether to conduct an assessment, about whether to pursue a claim, and even about whether to give a polluter a permanent covenant not to sue, based on little information. Except in the apparently unusual case in which EPA or a state went out of its way to collect needed data and to make needed observations of local fish and wildlife, Interior has to make a seat-of-the-pants decision based on few hard facts.

Let me discuss one example. According to our government sources, at a site draining into Waukegan Harbor in Illinois, the Outboard Marine Corporation disposed of between 275,000 and 1,700,000 pounds of PCBs. The harbor sediments reportedly have PCB contamination of up to 500,000 parts per million (ppm) PCBs. Fish swimming in the harbor for just a few months have been shown to have levels of PCBs many times the FDA-established health level for PCBs. Fish also migrate from many parts of Lake Michigan into the southern part of the lake, and may be exposed to PCBs from the site. The Department of the Interior is aware of this problem, but has yet to complete any detailed assessment of those damages, eight years after EPA issued a report documenting the severity of the harbor's PCB problem.[6]

This is but one example of Interior's failure to conduct an assessment in the face of compelling evidence that there are damages at a site. There are numerous other similar sites--such as the Bunker Hill site in Idaho where a lead mine and smelter reportedly contaminated a large area with lead and cadmium, destroying fish and other natural resources--at which Interior is aware of significant problems but has not done a damage assessment. Even if there were a strong management commitment at Interior to vigorously move ahead with the damage assessment and claim process--which there is not--there simply are few or no resources dedicated to completing assessments or doing detailed response work at most major oil spill and Superfund sites. The oil spill fund and Superfund must be made available for these purposes.

NOAA and Other Agency Damage Assessment Activities

The same problems occur at other agencies. A 1987 letter from this Subcommittee to several agencies with trust responsibilities appeared to surprise some agencies, such as the

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[6] See, EPA Region V, PCB Contamination Problem in Waukegan Harbor, Illinois, (1981).

Energy Department, who seemed to have little or no idea of how even to begin a natural resource damage assessment program.[7]

However, NOAA reported to this Subcommittee in late 1987 that it had, to date, completed 467 "coastal hazardous waste site" evaluations and found 143 "potentially affecting NOAA trust resources."[8] While NOAA staff generally appear to have taken their trusteeship duties seriously, there has not been adequate Superfund money available or adequate appropriations to enable NOAA to conduct the necessary damage assessments. Thus, even at NOAA's top priority site for an assessment in the nation, a severely polluted site off the coast of Los Angeles, no assessment can be done.

Moreover, even at the single site at which NOAA assessed and pursued natural resource damages, the New Bedford Harbor, Massachusetts PCB contamination site, the Justice Department settled the case with a major responsible party without complying with the requirements of Superfund. In a recent decision by the Federal District Court in Boston, the Court took the unusual step of rejecting the consent decree as unlawful.[9] The Court agreed with NWF, an intervener in the case, that the settlement violated CERCLA. The court found that there was no evidence that NOAA had agreed to the settlement as required by CERCLA § 122(j), and that the settlement illegally waived claims for future, unknown damages.

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[7] Letter to the Honorable Gerry E. Studds from Mary L. Walker, Assistant Secretary, Department of Energy, September 14, 1987.

[8] Letter to the Honorable Gerry E. Studds from Assistant Commerce Secretary J. Curtis Mack, dated September 23, 1987.

[9] In Re Acushnet River and New Bedford Harbor, C.A. No. 83-3882-Y (April 27, 1989).

The Justice Department in that case argued that Superfund's settlement provisions do not apply to settlements that settle only Superfund natural resource damage claims (as opposed to those that also settle cleanup claims). The court found that even if section 122 did not by its exact terms apply to the settlement, it would require compliance with Congress' intent evident in the settlement provision. The court also found, again contrary to the Justice Department's argument, that the settlement must require the responsible party to "undertake appropriate actions necessary to protect and restore the natural resources damaged," but rejected NWF's claim that this particular settlement failed on that score. We continue to be deeply troubled by the now-rejected settlement, which would have recovered but $2 million of over $50 million in estimated lost use values of the resources alone. We also are troubled that NOAA has apparently established its damage claim without any detailed consideration to the costs of restoring the injured resources--the most fundamental purpose of the Act.

EPA Natural Resource Damage Efforts

CERCLA Section 104(b)(2) requires that EPA shall "notify the appropriate Federal and State natural resource trustees of potential damages" and "shall seek to coordinate the assessments, investigations, and planning" of the cleanup with the trustees. While apparently some progress has been made in improving notification of trustees, EPA generally inadequately considers environmental impacts and natural resource damages in conducting inspections and investigations, drafting Remedial Investigation and Feasibility Studies, and in completing Records of Decision. Indeed, nearly a year after the natural resource damage coordination provision in section 104(b)(2) was adopted, EPA candidly admitted to this Subcommittee that "the Agency generally does not track National Priority List (NPL) sites for the purpose of identifying injury to natural resources, especially since the provisions of section 517 have eliminated the use of the Fund for natural resource damage claims."[10] While Superfund's availability for damage claims apparently has been terminated, EPA still has a duty under CERCLA § 104(b)(2) and under its statutory responsibility to protect human health and the environment at Superfund sites, and must more fully consider these problems.

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[10] Letter to the Honorable Gerry E. Studds from Lee M. Thomas, EPA Administrator, date September 14, 1987.

There are many cases in which EPA's decision not to "track" natural resource damages--and the trustees' failure to press the issue--has lead to inadequate consideration of such damages in cleanup decisions. A report by NWF, NRDC, the National Audubon Society, EDF, Sierra Club, U.S. Public Interest Research Group, and the Hazardous Waste Treatment Council, reviewed the first post-SARA year's Records of Decision (RODs).[11] The report found that EPA frequently fails to discuss how the remedy selected will affect natural resource damages. Often the RODs and underlying documents do not include data showing the degree of fish or wildlife injury at or near a site, even when such injury would appear to be a major concern. In effect, this means that natural resource damages at these sites will be addressed, if at all, in two completely separate proceedings. This wastes everyone's resources, may lead to failure to consider natural resource damages at all, and could preclude future claims due to res judicata or related bars to recovery of damages in later proceedings.

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[11] Environmental Defense Fund et al., Right Train, Wrong Track: Failed Leadership in the Superfund Cleanup Program (1988).

Overview of How the Program Has Operated in Practice.

Thus, the natural resource damage program has to date been a "back burner" issue, and has failed to live up to its potential. In many cases in the past, natural resource damages only became an issue because a responsible party sought a waiver of liability for such damages, and EPA or the Justice Department sought a waiver from the trustees at the last minute. The adoption of CERCLA § 122(j)--requiring trustee approval of all covenants not to sue for natural resource damages--appears to be helping to resolve this problem. But the program still is regarded with little enthusiasm by the management of most federal agencies. Until the vacuum in federal leadership is filled, it is difficult to imagine how this critically important program will begin to function effectively.

PROBLEMS WITH INTERIOR'S DAMAGE ASSESSMENT RULES

The Interior Department's natural resource damage assessment rules were issued under section 301(c) of the Comprehensive Environmental Response, Cleanup, and Liability Act (CERCLA) and are applicable to oil spills under section 311 of the Clean Water Act. Yet the rules so severely undervalue natural resources, they have to our knowledge never been used to file a claim for damages. The rules have been sharply criticized by academic commentators such as American University law Professor (and former Dean) Frederick Anderson, and many others,[12] and, as mentioned earlier, have been challenged in the D.C. Circuit by several environmental groups and states.[13]

At all Superfund sites, as well as at oil spills such as the Exxon Valdez tragedy, application of the Interior Department rules would seriously undervalue the injured or destroyed natural resources. Thus, full compensation for the restoration, replacement, or acquisition of resources equivalent to those injured or destroyed by the spill could not be assured. CERCLA provides that where resources are injured by releases of hazardous substances, the "measure of damages. . . shall not be limited by the sums which can be used to restore or replace such resources." CERCLA § 107(f)(1). Similarly, section 311(f)(5) of the Clean Water Act says that the trustees "shall recover for the costs of replacing or restoring such resources." Yet, under Interior's "lesser of" Rule at 43 C.F.R. § 11.35(b)(2), the trustees may recover only the "lesser of" those restoration costs versus the "lost use values" of the resources--generally measured using market values. This is directly contrary to President Bush's position after the Alaska spill that the government will seek "complete restoration of the ecology and economy of Prince William Sound," Washington Post at A4 (April 8, 1989), and contravenes Interior Secretary Lujan's statement that the government will get Exxon to "try to put [the environment] back as it was." Washington Post at A12 (April 12, 1989).[14]

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[12] See, e.g., Anderson, Natural Resource Damages, Superfund, and the Courts, 16 Envt'l Affairs 405 to 457 (1989); Note, CERCLA's Natural Resource Damage Provisions: A Comprehensive and Innovative Approach to Protecting the Environment, 45 Washington & Lee L. Rev. 1417 (1989).

[13] State of Ohio v. Interior, No. 86-1529 and consolidated cases; State of Colorado v. Interior, No. 87-1265 and consolidated cases.

A sample of some of the other major problems with the rules includes:

1. The Rigid Hierarchy Requiring Use of "Market Values" and Other Unreasonably Low Measures of Damages. The rules impose a rigid hierarchy of assessment methods, requiring the use of market values and other techniques that can substantially undervalue natural resources. Thus, for example, fur seals are worth $15 each--the market value of their pelt--according to Interior's "type A" damage assessment rules. 52 Fed. Reg. 9042, 9092 (March 20, 1987).

2. The Prohibition on Recovery Unless the Resources are Publicly Owned and Have "Committed" Uses. The rules prohibit recovery by the trustees for injury or destruction of resources unless those resources are publicly owned and have "committed" public uses.

3. The Provision Allowing a Federal "Lead Authorized" Trustee to Dictate Decisions to the State, Including The Responsible

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[14] Several environmental organizations and states recently asked Interior Secretary Lujan to revise the rules to come into compliance with his and the President's stated philosophy that full restoration should be required. See the attached letter to Secretary Lujan.

Party's Role in the Assessment, and Allowing The Responsible Party to Do "All or Part" of the Assessment. If the "lead authorized official" is a federal official, and chooses to make any decision--including a decision that the responsible party will conduct "all or part" of the damage assessment--the state trustee has no authority under the rules to overrule that decision.

4. The High Thresholds in Section 11.62(f) for Proving Injury. Under the rules, unless one of the enumerated "biological responses" is observed, the trustee must show that certain rigid "acceptance criteria" are met and that there is a statistically significant change between the resource before and after the release or spill. Control area data also are required, but may be difficult or impossible to obtain.

5. The Arbitrary 10 Percent Discount Rate for Future Damages. OMB insisted that future damages be reduced by a discount rate of 10 percent per year, so this was included in the rules.

6. The Preferential Treatment of Responsible Parties Over the Public. Under several provisions of the rules the responsible party--but not the public--is given a chance to review and comment on the assessment. If the responsible party is given an opportunity to review and comment on a document or issue, the public also should be given that opportunity.

In addition, Interior's simplified "type A" assessment rules have not been issued--seven years after the statutory deadline--for any resources other than those in coastal marine environments. This has meant that trustees would have to complete a detailed and expensive full-blown "type B" assessment for most minor spills or Superfund sites, thereby defeating Congress' intention to make it simple for trustees to assess damages at such sites. These and other problems have essentially rendered the rules useless to trustees, and have seriously undermined the effectiveness of the natural resource damage claims provisions.

AGENDA FOR CONGRESSIONAL ACTION

It is manifest that it must be a top priority of Congress to rescind the provision in the Tax Code (SARA § 517) removing the availability of the Fund for paying the cost of damage assessments. This ill-considered provision was adopted at the last minute during the SARA debate, in direct contravention of the language adopted by the Senate and House authorizing committees. We urge the members of this Committee to work with your colleagues on the Ways and Means Committee to swiftly reopen Superfund to pay for damage assessments; with the statute of limitations rapidly approaching at sites across the nation, timing is of the essence. Assessments will cost relatively little, and would result in the collection of far more in damages. Moreover, assessment costs are recoverable from responsible parties so the Fund can be replenished. It is absurd to allow hundreds of millions, or perhaps billions of dollars in claims against polluters to go uncollected, due to the statute of limitations or from a lack of data during settlement negotiations, when a small amount of money could enable the trustees to assess those damages and prosecute strong claims.

Second, Congress should adopt strong comprehensive oil spill legislation that does not preempt state liability laws or state oil spill funds. I will not go into details about non-natural resource damage related changes we are seeking in such a bill. However, it is important that it be made clear that natural resource damages are broadly defined and include restoration costs as well as lost use values of the resources. Moreover, we support the addition of mechanisms to ensure that natural resource assessments are begun and completed swiftly and competently. Representative Peter Smith's bill, H.R. 2223 includes one provision that could assist in that effort by designating a trustee council and mandating early PRP funding of certain trustee activities, and deserves serious consideration in Committee markup of the oil spill bill.

Finally, a detailed and in-depth GAO investigation of the program is needed urgently. Attached is a list of some of the issues that warrant GAO's attention.

CONCLUSION

To date, the natural resource damage program has been a headless horseman, without a horse. Interior has had to be dragged into court in order to get it to comply with the law, and other federal agencies also have lacked the will or resources or both to make the program work. Congress should take the steps urged above to rejuvenate this languishing but potentially very powerful weapon in the effort to protect and restore our natural environment.

STATEMENT OF
LEE P. BRECKENRIDGE
ASSISTANT ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS
BEFORE THE
HOUSE SUBCOMMITTEE ON
FISHERIES AND WILDLIFE CONSERVATION
AND THE ENVIRONMENT

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to testify on behalf of Massachusetts Attorney General James Shannon who is unable to attend this hearing today. We appreciate the invitation to address the legal and practical problems of remedying injury or destruction of natural resources, and we appreciate your interest in this important area.

SUMMARY OF TESTIMONY

The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") mandates recovery for natural resource damages caused by releases of hazardous substances. To date, however the assessment and recovery of natural resource damages has generally taken second place to site cleanup and recovery of "response costs." The strong public interests in the protection of natural resources, recognized in the Act, have not been well implemented. A major reason for this failure has been the lack of adequate regulations to provide a framework for natural resource damage assessment. The Department of the Interior after long delays promulgated regulations on damage assessments, but these regulations have restricted natural resource trustees instead of furthering the broad goals of the Act.

We urge the development of adequate legal tools to support claims by federal and state trustees for natural resource damages In addition, we support legislative amendments to CERCLA that would provide much-needed funding to pursue these claims.

DETAILED COMMENTS

I. Statutory Framework

In enacting the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 ("CERCLA"), and the subsequent Superfund Amendments and Reauthorization Act of 1986 ("SARA"), the Congress established not only a program for the state and federal governments to recover their "response costs" at hazardous waste sites, but also a framework for recovering "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." 42 U.S.C. § 9607(a)(4)(c). "Natural resources" broadly encompass "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . [and] any State or local government . . ." Id. at § 9601(16). The parties responsible for the release of hazardous substances into the environment are strictly liable for natural resource damages to the federal or state government having jurisdiction over that resource, or both. 42 U.S.C. § 9607(f)(1). When damages are recovered, they may be used "only to restore, replace, or acquire the equivalent of such natural resources." 42 U.S.C. § 9607(f)(1).

II. The Department of Interior Natural Resource Damage Assessment Regulations

While Congress clearly intended CERCLA to provide a mechanism for restoring or replacing natural resources as well as assessing the damage done, we are greatly concerned about the manner in which its provisions have been executed. CERCLA required the promulgation of regulations which would develop new methods for carrying out assessment and for identifying injuries to natural resources.[1] Despite clear instructions in CERCLA requiring promulgation of regulations for the assessment of natural resource damages by December, 1982, the

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1/ CERCLA required that the regulations specify "standard procedures for simplified assessments requiring minimal field observations" ("type A" regulations), 42 U.S.C. § 9651(b)(2)(A), and "alternative protocols for conducting assessments in individual cases to determine the type and extent of short- and long-term injury, destruction, or loss", id. at (b)(2)(B). Type B rules were promulgated by the DOI on August 1, 1986. 51 Fed. Reg. 27674 (August 1, 1986). Type A rules were promulgated by the DOI on March 20, 1987 52 Fed. Reg. 9042 (March 20, 1987). Revisions were made on February 22, 1988. 53 Fed. Reg. 5166 (February 22, 1988). The regulations are not mandatory in that trustees are not obligated to rely on them in every case. By using the regulations, however, a trustee's assessment receives a rebuttable presumption in any natural resource damages litigation involving that assessment. 42 U.S.C. § 9607(f)(2)(c).

Department of the Interior ("DOI") did not promulgate regulations until August, 1986, and when it did so, it promulgated regulations woefully inadequate to the task at hand. Indeed, the rules have been challenged in litigation brought by ten states, including the Commonwealth of Massachusetts.[2/] The Commonwealth of Massachusetts, like other states, has not used the regulations, in part because they are so flawed.

The natural resource damage assessment regulations contain numerous troubling provisions. The most troubling is the rule which restricts a trustee using the regulations to recovering the lesser of "restoration or replacement costs" (what it costs to restore or replace the particular damaged resource) or the "diminution of use value" (the value of the lost uses of the injured resource). 43 C.F.R. § 11.35(b)(2). The effect of the rule is that a trustee may only recover the lost use value of a resource even if the cost of restoring an injured natural resource or acquiring a replacement for the resource is known and would more adequately serve the public interests at stake.

Such a result is contrary to the language of CERCLA, its legislative history, and the Congress' purpose in enacting CERCLA. The regulations should serve to expand and enhance the

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2/ *State of Ohio v. Dep't of the Interior, et al.*, No. 86-1529 and consolidated cases (D.C. Circuit) (challenging the "type B" rules); *Colorado v. Dep't of the Interior*, No. 87-1265 and consolidated case (D.C. Circuit) (challenging "type A" rules); *State of New York, et al. v. Dep't of the Interior*, No. 88-1366 (D.C. Circuit) (challenging rulemaking dated February 22, 1988 to revise Type A and Type B rules).

trustees' ability to prove the value of natural resources to society, and to restore or replace them fully, not to hinder the trustees in their task. The regulations presently in effect subvert the goals of CERCLA and frustrate trustees in carrying out their responsibilities under state and federal law.

A second troubling aspect of the regulations is their reliance on "market value." Natural resources by their nature have values that are difficult to convert to monetary terms. Even where a market value can be assigned to a resource -- i.e., to an individual fish sold for food, or a pelt sold for use as an article of clothing -- the market value may not reflect the entire value of the resource to society. For example, wetlands may have limited value on the real estate market, and yet hold great value to the public at large for their wildlife habitat and pollution control properties. Trustees need to have the flexibility in any damage assessment calculation to rely on whatever measures of value are available and appropriate in the situation by assessing the full value of a resource to the extent that value can be determined. They should not be limited to using that value which automatically gives the smallest measure of value and thus, damages, for the resource.

A third problem with the regulations is that they do not provide any compensation for injuries to resources that have not been "committed" to a specific public use (such as a public park). The vast array of natural resources which are not specifically committed formally to a public use or which are subject to the ownership rights of private parties are thus intentionally omitted from the damage assessment regulations. This approach ignores important public rights in natural resources. For example, Massachusetts law recognizes ground water as a natural resource that belongs to the Commonwealth and is subject to ongoing control and regulation for the benefit of the public. Coexisting private rights to make use of that resource do not remove its inherent value as a public resource. In essence, the regulations wrongly treat overlapping public and private rights as though they fell exclusively in private hands.

The rules create a fourth problem by requiring a trustee to prove beyond a scientific doubt that a particular natural resource injury resulted from a particular discharge of hazardous substances. This excessively restrictive standard of proof conflicts with the objectives of CERCLA, and imposes additional financial and technical requirements on trustees that may be impossible to meet.

While these are not the only flaws in the natural resource damage assessment regulations, they are the most troublesome obstacles to recovery of damages for injury to natural resources under the regulations. That the regulations are optional does not render the regulations harmless. Natural resource damage assessment is an art which is in the early stages of development. Any methodology that the federal government maintains as the "correct" approach -- to the exclusion of others -- is bound to have an influence beyond its immediate application, as trustees and courts work to establish precedents for future assessments. The regulations serve as a poor model for fully exploring the scope of "natural resource damages" under CERCLA. Moreover, they deny trustees the benefit of any rebuttable presumption for other approaches to damage assessment. This critical difference in the burden of proof will no doubt gravely undermine the use of other methods that would value natural resources more adequately.

III. The Need for Funding for Natural Resource Damage Assessments

One of the most important problems experienced by trustees under the existing statutory and regulatory scheme is the lack of funding for assessment and litigation activities by trustees. Assessing natural resource damages and pursuing litigation to recover damages under CERCLA (or under similar state statutes) are resource-intensive activities. Many states do not have the financial resources to carry out these responsibilities. Under present law, the Superfund may not be used to fund natural resource damage assessments. SARA, § 517(a). Funding for such assessments now comes, if at all, from other limited agency funds.

The lack of funding for damage assessments is an obvious reason why so few natural resource damages claims are pursued. In Massachusetts, only one major natural resource damage assessment has been carried out, in litigation concerning the contamination of New Bedford Harbor with polychlorinated biphenyls ("PCBs"). This assessment was funded almost entirely by the National Oceanic and Atmospheric Administration as co-trustee of natural resources and co-plaintiff in the litigation. At other important hazardous waste sites, in Massachusetts as in other states, natural resource damages claims have been omitted or asserted only in general terms and compromised through settlement agreements on remedial measures.

If natural resource damages claims are to develop more broadly in judicial precedent as meaningful causes of action in hazardous substances cases, adequate funding is needed to fund damage assessments by both federal and state trustees, and to fund the costs of carrying on the complex litigation needed to recover damages for injuries to natural resources. Such funding needs to be specifically available for natural resource damage-related activities and not for other competing purposes. We strongly urge enactment of legislative amendments to address these funding issues.

IV. Use of Funds Recovered For Natural Resource Damages

It is also important that damages recovered in natural resource damage recovery actions be segregated from general government revenues. CERCLA's requirement that such damages be used to "restore, replace, or acquire the equivalent" of the injured natural resource and to carry out assessments reflects important public goals clearly recognized by Congress. Natural resources belonging to the public are more than mere private property interests, and CERCLA recognizes their unique value by calling for restoration and replacement, not simply conversion of the loss into dollars. Just as the resources themselves are held in trust for the benefit of the public, so the funds recovered should be held in trust and applied in accordance with CERCLA's mandate.

SUMMARY

In summary, the regulations currently in effect governing natural resource damage assessments inadequately implement the provisions of CERCLA, and in fact obstruct the efforts of trustees to carry out their tasks concerning natural resources and on behalf of the public, by undervaluing natural resources, by precluding the recovery of damages to accomplish restoration or replacement of injured natural resources, by severely limiting the category of natural resource damages which may be recovered, and by creating technical obstacles to proving the damages in a particular case. State and federal trustees need more effective legal tools and adequate funding if they are to carry out damage assessments and natural resource damage actions expeditiously and successfully.

Thank you.

STATEMENT OF
LOUISE WISE, DEPUTY DIRECTOR
OFFICE OF MARINE AND ESTUARINE PROTECTION
OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION AND ENVIRONMENT
COMMITTEE ON MERCHANT MARINE AND FISHERIES
UNITED STATES HOUSE OF REPRESENTATIVES

MAY 25,1989

Mr. Chairman and members of the Subcommittee, I am Louise Wise, Deputy Director for the Office of Marine and Estuarine Protection in the Office of Water at the U.S. Environmental Protection Agency (EPA). I am also acting as the Alternate Chair of EPA's National Incident Coordination Team (NICT). The NICT is an internal EPA group of representatives from all Headquarters and Regional offices established to coordinate Agency response actions and communication during extraordinary emergency situations of national or international significance, such as the Exxon Valdez incident. In light of President Bush's direction to William K. Reilly, EPA Administrator, to coordinate the long-range planning for the restoration of Prince William Sound, I appreciate very much this opportunity (1) to discuss EPA's authority under the National Contingency Plan, and (2) to outline EPA's unique role in the restoration of the areas affected by the Exxon Valdez spill.

EPA's Authority under the National Contingency Plan

The National Oil and Hazardous Substances Contingency Plan (NCP) was first developed in 1968 in the aftermath of the massive oil spill from the Torrey Canyon affecting French and English beaches. This plan was revised in 1970 to create the first National Response Team (NRT). In 1971 EPA became its Chair and the Coast Guard its Vice-Chair. In 1980, the responsibilities of the NRT were expanded to include actions under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). The NRT now consists of 14 Federal agencies, including all of the Federal Natural Resources Trustees designated by the President under section 107(f)(2) of CERCLA. It is the responsibility of the NRT to coordinate response activities of the Federal government and to ensure that there is only one person, the On-Scene Coordinator (OSC), making decisions regarding response actions for each incident.

In the event of an oil spill or hazardous substance release, various Federal agencies are called upon to provide assistance under the NCP. Depending on the location of an oil spill or release of hazardous substances, either EPA or Coast Guard designates the OSC. The OSC has complete Federal responsibility for on-scene actions to prevent, contain, assure cleanup of, and otherwise mitigate the spill. Generally, EPA's jurisdiction is over navigable waters above the tidal zone (inland waters). The Coast Guard has jurisdiction for the coastal zone, tidal waters (including Prince William Sound), the Great Lakes and major river ports. Therefore, the Coast Guard is the OSC in the Exxon Valdez incident. The OSC's authority also includes the ability to access the 311(k) Fund (established under section 311(k) of the Clean Water Act (CWA)) and to make any and all decisions necessary to protect public health and the environment. The 13 other member agencies of the NRT, plus the Alaska Regional Response Team (consisting of Federal agencies at the Regional level and State agencies which are immediately involved in or affected by the spill) assume a support role and assist the OSC wherever possible.

The NCP establishes a comprehensive national planning and response structure that covers the roles of Federal, State and local governments, responsible parties, the private sector and volunteers in responding to releases of oil, hazardous substances, pollutants or contaminants. The purpose of the NCP is to effectuate the preparedness and response powers and responsibilities created by CERCLA and the authorities established by Section 311 of the Clean Water Act. The Plan, among other things, provides for coordination between response actions and the assessment of injury to natural resources. Executive Order 12580, which delegates the President's responsibilities under the Superfund Amendments and Reauthorization Act of 1986 (SARA), gave to EPA the authority to revise the NCP. Most recently, EPA proposed a revision of the Plan in December, 1988 in consultation with members of the National Response Team (NRT), which clarified the role of the Natural Resource Trustees.

Both CERCLA and the NCP address the role of Natural Resources Trustees in damage assessment in several ways, including requirements that:

(1) the natural resource trustees be notified of releases that may result in injury to a natural resource;

(2) the assessment, investigation and planning of response actions be coordinated with natural resource trustees; and

(3) States, Federal and Indian Tribal natural resource trustees be notified of settlement negotiations with potentially responsible parties.

Because of EPA's unique role in overall environmental matters, its extensive scientific expertise, its responsibility in the development and promulgation of the NCP, and its numerous other environmental statutory responsibilities, EPA has much experience in ensuring coordination which achieves desired environmental objectives. Other than EPA's direct and broad response authorities under CERCLA and CWA, its ongoing role in the case of the Exxon Valdez oil spill response is largely one of working within the Regional Response Team and providing technical support, as required. The limitations on the use of CERCLA funds for damage assessments and natural resource restorations imposed by SARA have resulted in increased EPA efforts aimed at supporting actions which may be initiated by trustees against parties liable for releases pursuant to section 107 of CERCLA.

While not directly related to the Exxon Valdez incident, the agency has many specific and ongoing remedial response program efforts affecting the work of the Trustee agencies which include:

(1) requesting that States and Indian Tribes designate officials that will serve as trustees;

(2) providing the scope of proposed studies and investigation designed to assess the nature and extent of contamination upon notification of a release, at the request of the trustee;

(3) proposing revisions to the criteria for listing sites on the NPL to take into account the damage to natural resources which may affect the human food chain;

(4) issuing environmental assessment guidance to better address the threat to natural resources;

(5) evaluating remedial alternatives that best address the

source contamination that may give rise to natural resource injury;

(6) coordinating remedial actions to ensure that the residual injury will be addressed by the appropriate trustee (e.g., New Bedford Harbor site);

(7) funding through the CERCLA interagency budget process minimal level of expertise in support of non-site specific activities; and

(8) funding site-specific preliminary resource surveys (conducted by DOI and the Department of Commerce before EPA will recommend that the Department of Justice release a potential responsible party from liability under CERCLA).

The environmental assessment guidance mentioned above in paragraph (4) and entitled Risk Assessment Guidance for Superfund -- Environmental Evaluation Manual (Interim Final), guides EPA's actions when EPA has lead responsibility for coordinating Federal activities. It was issued by EPA's Office of Solid Waste and Emergency Response for environmental evaluations of sites. This guidance encourages close cooperation among concerned parties in the planning of remedial actions in order to achieve protection of the environment. Most Federal Regional offices have Biological

Technical Assistance Groups that are the focal point for this cooperation. The groups use the expertise of EPA biologists and Trustee Agency field specialists. These groups identify resource concerns at sites and make recommendations during the Remedial Investigation/Feasibility Study process. This coordinated evaluation process may obviate the need for damage assessments by insuring that Trustee concerns are addressed by the potentially responsible parties within the remedial process. When Trustee concerns are met, responsible parties may be released from the threat of further action by the Trustee with a covenant not to sue. The goal of this activity and the others listed above is to address natural resources with EPA's current authorities and statutory limitations in a way that supports and complements the activities of the designated Federal Trustees. This process provides that the Federal Trustees in turn coordinate their natural resource damage assessment activities with response authorities to avoid interfering with cleanup activities.

Proposed Long-Range Restoration of Prince William Sound

With respect to the Exxon Valdez oil spill, long-term effects to the area's rich resources may result from food chain and habitat disruption as well as from decreased survivability and reproductive capability of animals directly exposed to the oil. Determining these impacts will require study of the species of concern throughout their life cycle or longer.

To deal with these long-term effects, President Bush has directed EPA Administrator William K. Reilly to coordinate the long-range restoration of the environment of Prince William Sound. In order to carry out the President's directive, the Administrator, in close coordination with the Federal Trustee agencies and the State of Alaska, is establishing a group which will serve as the coordinating mechanism for actions leading to the development of a plan for the long-term recovery of the environment. This coordination group would be comprised of EPA and representatives from the Trustee agencies. The coorindation group would provide a national focus for Alaska activities related to the Exxon Valdez incident, and would be responsible for the overall coordination among Federal agencies and of the long-term recovery of the area impacted by the Exxon Valdez oil spill, while the primary responsibility for the implementation of those activities would remain with the Trustee agencies. The group would build on existing mechanisms now in place, such as the Trustee Council and the National Ocean Pollution Prevention Board.

In conclusion, Mr. Chairman, much work lies ahead for us. The President has directed us to coordinate our efforts to ensure recovery of the environment affected by the Exxon Valdez oil spill. This work will require innovative multidisciplinary approaches and the close coordination of the efforts of agencies. We look forward to a continuing dialogue with you as our plans develop.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

October 3, 1989

Honorable Walter B. Jones
Chairman, Committee on Merchant
Marine and Fisheries
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

At the May 25, 1989, House Committee on Merchant Marine and Fisheries hearing, Congressman Dyson inquired about Maryland sites at which Interior had done a Preliminary Natural Resource Survey (PNRS). We agreed to supply the information for the record. The question by Congressman Dyson was as follows: "...I was wondering if the Department of the Interior has identified or surveyed any sites in the State of Maryland where damages to natural resources need to be assessed or restored?" (At line 1727, page 82, of the draft transcript.)

The response to the question was researched by the Office of Environmental Project Review, the staff which administers this PNRS system, under the Assistant Secretary for Policy, Budget and Administration.

The Department of the Interior conducts Preliminary Natural Resource Surveys at sites on the Environmental Protection Agency's National Priorities List (NPL). These surveys are intended to be quick reviews, a desk top survey if possible, of information already available on the site, to ascertain if there is an indication of injuries to natural resources under the management or protection of the Department. There are ten hazardous waste sites in Maryland currently listed, and the Department has done or is doing PNRS at eight of the ten sites over the last four years. The sites include:

Sand, Gravel and Stone site, Elkton, Cecil County
Mid-Atlantic Wood Preservers, Inc. site, Harmans, Anne Arundel County
Aberdeen Proving Ground - Edgewood Area Site, Edgewood, Hartford County
Woodlawn County Landfill site, Woodlawn, Cecil County
Southern Maryland Wood Treating Corp. site, Hollywood, St. Mary's County
Aberdeen Proving Ground - Michaelsville Landfill site, Aberdeen, Baltimore County
Limestone Road site, Cumberland, Allegany County
Kane & Lombard Street Drums site, Baltimore, Baltimore County

At this time our files show no evidence of natural resource injuries of major significance. However, Fish and Wildlife Service personnel report that some of the sites may need mitigation measures to correct for natural resource injury. One way in which such mitigation measures are identified and fed into the site remedial process in this region is through a Bioassessment Work Group established by the Region III office of the EPA, in which Interior and other trustee agencies assist EPA in identifying natural resource concerns at sites. Since injuries subject to claims under a natural resource damage assessment are those remaining after the response cleanup is accomplished, in many of these cases a final determination of compensable natural resource damages would not be made until later in the remedial action process managed by EPA. We will be continuing to work with the EPA on plans for cleanups at these sites.

Sincerely,

James F. Spagnole
Legislative Counsel

cc:
Congressman Roy P. Dyson
Merchant Marine and Fisheries
Cannon House Office Bldg., Rm. 326
Washington, D.C. 20515